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**IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

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**DAROLD R.J. STENSON,**

**Petitioner-Plaintiff,**

**v.**

**ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity), *et al.*,**

**Respondents-Defendants.**

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# AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The ACLU of Washington is a nonprofit, nonpartisan 25,000 member organization dedicated to the principles of liberty embodied in the U.S. Constitution and Washington constitution. The ACLU opposes the death penalty, regardless of the chosen method of execution. It has participated in death penalty litigation in Washington for many years, including having *amicus* briefs accepted by this Court in several capital cases.[1]

## II. ISSUE ADDRESSED BY AMICUS

Would executing the Petitioners by lethal injection violate the Cruel Punishment Clause of Washington's Constitution?

## III. STATEMENT OF THE CASE

Petitioners presented compelling evidence at trial of defects in the ever-changing lethal injection protocol the Department of Corrections (DOC) planned to use to carry out the executions of Messrs. Stenson, Gentry and Brown. Op. Br. of Appellant at 5-27. DOC's medical director resigned[2] because of ethical concerns regarding participating in an execution, and the entire execution team resigned because the trial court granted discovery of the team's medical training (Petitioner Br. at p. 9-10). The medical competency of the team thus remains unknown. The trial court

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[1] *See In re PRP of Stenson*, 150 Wn.2d 207, 76 P.3d 241 (2003); *In re PRP of Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004); and *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006).

[2] seattletimes.nwsource.com/html/localnews/2008558781_execution25m.html

rejected Petitioners' state constitutional challenge, ruling that "for purposes of this case," the state constitution's cruel punishment clauses was no different than the Eighth Amendment." CP 3207, 3214-15.

## IV. SUMMARY OF ARGUMENT

Washington's Cruel Punishment Clause (Wash. Const. Art. I, § 14) affords greater protection than the Eighth Amendment. Defects in Washington's method of execution and capital punishment system demonstrate that it is time for Washington to stop "tinkering with the machinery of death" and rule the executions of Petitioners to be unconstitutional.

## V. THE HISTORY OF EXECUTIONS IN WASHINGTON DEMONSTRATES THAT ALL METHODS ARE FLAWED

Washington's territorial legislature first enacted a statute mandating the penalty of death for anyone convicted of first degree murder in 1854.[3] Washington executed 23 individuals in the late 1800s.[4] Before the turn of the century, hanging was the nearly "universal form of execution." *State v. Frampton*, 95 Wn.2d 469, 492, 627 P.2d 922 (1981). The 1854 Territorial Law provided: "The punishment of death prescribed by law must be inflicted by hanging by the neck."[5] The Criminal Practice Act of 1873 contained an identical provision,[6] as did the 1881 Code of Washington.[7]

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[3] Act of April 28, 1854, 1854 Wash. Laws 75, 78.
[4] http://deathpenaltyinfo.org/deathpenaltystats.xls ("DPIC Spreadsheet").
[5] 1854 Wash. Laws p. 125 §123 ("Hanging Statutes").
[6] 1873 Wash. Laws p. 244, §289.

Historians report that lethal injection was considered a potential execution method in the United States as early as 1888. A New York commission searching for an acceptably humane method of execution rejected lethal injection, in part because of the concern that the public would link the practice of medicine with death.[8] At the time Washington enacted its constitution in 1889, 48 states used hanging as the method of execution. *Campbell v. Wood*, 18 F.3d at 662, 697-98 (9th Cir. 1994) (Reinhardt, J., dissenting). These hangings usually occurred in public.[9]

In 1909, the Washington legislature eliminated automatic death sentences and made first degree murder punishable by either life imprisonment or death, at the trial judge's discretion.[10] According to DOC, 15 men were executed between 1904 and 1911.[11] These executions were not without controversy and in 1913, the Washington legislature abolished the death penalty.[12] According to news accounts, a wave of legislative reform occurred in Washington after women were given the right to vote in 1911.

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[7] 1881 Code of Wash. at p. 207, § 1131.

[8] Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 64 (2007) ( "Lethal Injection Quandary").

[9] Casey L. Ewart, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 Wm. & Mary Bill of Rts. J. 1159, 1161 (February 2006). For a gripping story of the public 1900 hanging of a possibly innocent man in Spokane, Washington, *see* Dick Krutch, *A Hanging in Spokane: The 1897 Case of* State *of Washington vs. George Webster*, Washington State Bar Magazine (Dec. 2009), available at www.wsba.org.

[10] Act of March 22, 1909, ch. 249, §140, 1909 Wash. Laws 890, 930.

[11] *See* Dept of Corrections List of Executed Men, at http://www.doc.wa.gov/-offenderinfo/capitalpunishment/executedlist.asp (referred to hereafter as "DOC Executed List").

[12] *See* Act of March 22, 1913, ch. 167, §1, 1913 Wash. Laws 581.

One of the reform measures was the abolition of the death penalty, perceived by many legislators as barbaric.[13] Arguments advanced included the fact that executions had not lessened crime, was unjust and was inhumane.[14] This change led to a ten year respite in executions.

The state legislature reinstated the death penalty in 1919.[15] From 1919 to 1963, Washington hanged 58 men[16] While Washington retained hanging, other states and countries rejected it as too barbaric. In the 1950s, Great Britain concluded lethal injection was no better than hanging.[17] At the same time, numerous challenges to the constitutionality of capital punishment were making their way through federal courts. Washington's death penalty statute was ruled unconstitutional by *Smith v. Washington*, 408 U.S. 934, 92 S. Ct. 2852, 33 L.Ed.2d 747 (1972), when the U.S. Supreme Court vacated a Washington death sentence under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

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[13] *See* HistoryLink Essay, *Washington abolishes the death penalty on March 22, 1913*, www.historylink.org, citing "Goss Wins Fight Against Hanging," Seattle Post-Intelligencer, February 21, 1913.

[14] Norman S. Hayner & John R. Cranor, *The Death Penalty in Washington State*, 284 Annals of the American Academy of Political and Social Science 101 (November 1952), quoting the *Olympic Daily Recorder*, February 21, 1913.

[15] *See* Act of March 4, 1919, ch. 112, §1, 1919 Wash. Laws 273, 274, attached as Appendix 9.[16] *See* DOC Executed List; DPIC Spreadsheet.

[16] *See* DOC Executed List; DPIC Spreadsheet.

[17] Lethal Injection Quandary, at 64-65.

In 1975, the Washington legislature abolished the death penalty in reaction to these legal challenges.[18] But in the November 1975 state general election, Washington voters approved Initiative Measure No. 316, which reinstated the penalty and eliminated discretion in the imposition of the death penalty. The law mandated execution for first-degree murder.[19]

When the Supreme Court invalidated mandatory death penalty provisions in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976), our death penalty statute became unenforceable.[20] The same year, Georgia's revised death penalty statute was affirmed in *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), with the Court finding that safeguards built into that statute were adequate to prevent the death penalty from being imposed arbitrarily. After *Gregg*, the Washington legislature passed a new death penalty statute modeled after the Georgia legislation[21] Hanging remained the sole method of execution.

Lethal injection was first adopted by a state in May 1977, when Oklahoma passed a lethal injection statute.[22] When two Oklahoma state legisla-

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[18] Washington Criminal Code Act of 1975, ch. 260, 1975 Wash. Laws, 1st Sess. 817, 862 (repealing murder statutes).
[19] 1975-76 Wash. Laws, 2d Sess. 17, codified at RCW 9A.32.045-.047 (repealed 1981).
[20] AGO 1976 No. 15.
[21] 1977 Wash. Laws, ch. 206 §7 (1977).
[22] *See* An Act Relating to Criminal Procedure; Amending 22 Okla. Statutes 1971, § 1014, and Specifying the Manner of Inflicting Punishment of Death, S.B. 10, 36th Leg., 1st

tors consulted the state chief medical examiner for a method of killing by injection, he suggested the three-drug cocktail now widely used across the United States.[23] Texas passed a lethal injection statute the next day.[24]

In 1980, this Court invalidated several provisions of Washington's 1977 statute in *State v. Martin*, 94 Wn.2d 1, 614 P.2d (1980). The *Martin* decision, along with a challenge to hanging that had been briefed and argued in *Frampton*, 95 Wn. 2d 469, 627 P.2d 922 (1981), led prosecutors to draft and submit a proposed death penalty bill to try to fix the constitutional errors identified in *Martin* and, in anticipation of an adverse ruling in *Frampton*, to eliminate hanging as the method of execution.

In December 1980, prosecutors proposed revisions, one of which provided for the use of lethal injection:

> (a) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary.
>
> (b) In the event that the execution of the sentence of death as provided by Section 14(a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be

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Sess. (Okla. 1977), *Lethal Injection Quandary*, *supra*, at 66; Jerry Merrill, *The Past, the Present and the Future of Lethal Injection: Baze v. Rees' Effect on the Death Penalty*, 77 U.M.K.C. L. Rev. 161, 165-166 (Fall 2008) ("Merrill").

[23] Lethal Injection Quandary, *supra*, at 68-69.

[24] Amnesty Int'l, *Lethal Injection: The Medical Technology of Execution* 6 (Jan. 1998 & Sept 1999 update), Merrill, *supra*, at 166.

> inflicted by hanging by the neck which shall be supervised by the superintendent of the penitentiary.[25]

The similarity between the language of a 1978 Texas case (*Ex Parte Granviel*, 561 S.W.2d 503 (Tex. 1978) and the Washington prosecutors' explanation of the proposed bill suggests that using sodium thiopental was derived from testimony in the *Granviel* case.

A review of the legislative history of the subsequently introduced bill in Washington, HB 76, reveals no indication that anyone consulted a medical expert in identifying sodium thiopental as an appropriate execution drug.[26] Section 20 of HB 76 contained identical language as initially proposed by the prosecutors. *Id.* Substitute HB 76, introduced in the House in early March 1981, proposed giving the superintendent of the penitentiary the authority to "establish procedures whereby the sentence of death is carried out by two or more persons under circumstances making it impossible to determine actual personal responsibility for the execution of the sentence." *Id.* While the bill was being debated, this Court issued its decision in *State v. Frampton*, on April 16, 1981. In a 6-to-3 vote, the Supreme Court held that hanging was not an unconstitutional method of execution. *See* Dissent of Rosellini, J., 95 Wn.2d at 512 with concurrence of Dore, J.,

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[25] *See* December 30, 1980 Letter from King County Prosecuting Attorney Ronald A. Franz to Rep. Earl F. Tilly.

[26] *See* HB 76 Bill Documents, available from the Washington State Archives.

and Concurrence/Dissent of Stafford, J., 95 Wn.2d at 513-514 with concurrence of Brachtenbach, C.J., Hicks, J., and Dimmick, J. Five days after the *Frampton* decision, the state senate amended SHB 76 to retain hanging as the primary execution method, with lethal injection an option to be selected by a defendant.

Today, thirty-six states, including Washington, and the U.S. military and U.S. government have switched to lethal injection.[27] Most states, like Washington, "have foregone medical and scientific studies to analyze or improve the protocol, but instead have simply, 'mirror[ed] the legal and scientific choices that Oklahoma officials made [over] thirty years ago.'"[28] In 1986, the Washington legislature, at the request of DOC, removed the reference to sodium thiopental as the lethal injection drug.[29] According to the legislative reports from the time, DOC requested the modification because "[a]ctual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions." The information may have been provided by Texas.[30] Texas had executed 10 men by lethal injection by this time. One of the first "botched lethal injection ex-

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[27] *See* http://www.deathpenaltyinfo.org/methods-execution .
[28] Merrill, *supra*, at 166, quoting *Lethal Injection Quandary*.
[29] *See* Engrossed Substitute Senate Bill 4683, amending RCW 10.95.180(1); *see also State v. Campbell*, 112 Wn.2d 186, 192, 770 P.2d 620 (1989), quoting RCW 10.95.180 (1986).
[30] *See* Human Rights Watch, *So Long as They Die: Lethal Injections in the United States*, Vol. 18, No. 1(G), at 13 (April 2006).

ecutions" took place in Texas in 1984, when James Autry was executed and it took Autry ten minutes to die, during which time he was able to move and complain of pain.[31]

It has long been assumed that Texas and Oklahoma included pancuronium bromide in their protocols because the drug will paralyze the prisoner preventing him from moving during the execution, reducing witnesses' discomfort in watching the death.[32] The testimony at trial in this case supports this assumption. Tr. 273, l. 13-14; Tr. 443, l. 24 – 444, l. 21; Tr. 574, l. 2-10; Tr. 578, l. 8-14.

In September 1994, a federal court held that hanging death row inmate Mitchell Rupe would constitute cruel and unusual because of the risk that Mr. Rupe would be decapitated during his execution. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), *aff'd in part and vac'd in part*, 93 F.3d 1434 (9th Cir. 1996). This case led the legislature to make lethal injection the default execution method in this state, with hanging an

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[31] *Use of Pavulon*, 14 Wm. & Mary Bill Rts. J. at 1167-1168. *See also Lethal Injection Quandary*, 76 Fordham L. Rev. at 179.

[32] In *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008), Kentucky argued that "maintaining an appearance of dignity" was the sole reason for its use of a paralytic agent as the second drug in its sequence. Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 Am. Crim. L. Rev. 1101, 1136 (Summer 2008) ("*Impermissible Research*"). *See also* Alper, 35 Fordham Urb. L. J. at 819 n.17 (pancuronium bromide has no therapeutic benefit but makes the execution appear "peaceful" to witnesses).

option only available if chosen by the defendant.[33] The purpose of the change was to eliminate the argument that hanging is unconstitutional.[34] The bill passed and RCW 10.95.180 (1) remains the same today.

While non-medically trained people envision lethal injection as the process of painlessly allowing a person to drift to sleep peacefully and to cease breathing shortly after losing consciousness, the reality of this execution process is now known to be much different than once imagined. The stories of "botched" executions using lethal injection abound.[35] The problem with adopting technologically complicated death machinery, such as electric chairs or gas chambers, or complicated medical-type execution procedures, such as lethal injections, is that people trained to be competent in medical procedures are not running the machines or performing the procedures. The State's expert in this case, Dr. Mark Dershwitz, notes that "[i]t is virtually unanimously accepted by physicians, particularly anesthesiologists, that the administration of lethal doses of pancuronium and/or potassium chloride to a conscious person would result in extreme suffer-

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[33] *See* SB 5500 (1996) available at http://search.leg.wa.gov.

[34] *See* Senate Bill Report, SB 5500 ("Washington is out there alone in defending hanging as the primary form of execution."). *See also* House Bill report, SB 5500 (noting the *Rupe* holding that execution by hanging had been found to be unconstitutionally cruel).

[35] *Impermissible Research*, 45 Am. Crim. L. Rev. at 1107. Michael Radelet, Examples of Post-Furman Botched Executions (September 16, 2009), http://www.death-penaltyinfo.org/some-examples-post-furman-botched-executions, and Human Rights Watch, World Report 2009 at Chapter VI, "Botched Executions

ing."[36] Dr. Dershwitz acknowledges that the protocol must be implemented with **correct** doses of the **correct** medications, which must be administered in the **correct** order into a properly functioning intravenous delivery system, with sufficient time for the first drug to produce unconsciousness. *Id.*

The statute requires the drugs to be administered intravenously, thus proper insertion of the IV catheter is critical. RCW 10.95.180 (1). This has repeatedly caused problems in practice. There is no dispute that it would be unconstitutional to inject a conscious person with pancuronium bromide and potassium chloride in the amounts contemplated by the lethal injection protocol. *See Morales v. Tilton*, 465 F. Supp.2d 972, 978 (N.D. Cal. 2006). Assessing the depth of unconsciousness from an anesthesia "is a complex examination requiring both significant training and experience." Dershwitz at 949; *see* RP 347-348. There is nothing in DOC's protocol that requires the prison superintendent to have any experience in assessing the depth of an inmate's consciousness. RP 681.

## VI. WASHINGTON'S DEATH PENALTY SYSTEM, INCLUDING FLAWS IN THE METHOD OF EXECUTION, VIOLATES THE CRUEL PUNISHMENT CLAUSE

### 1. The State Constitution is More Protective than the Eighth Amendment

[36] Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental As Used in Lethal Injection*, Fordham Urb. L. J. 931 (2008) ("Dershwitz").

Wash. const. art. I, § 14 provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." [37] The text of this provision differs from the text of the Eighth Amendment and, as a result, in *State v. Fain,* 94 Wn.2d 387, 617 P.2d 720 (1980), and *State v. Thorne,* 129 Wn.2d 736, 921 P.2d 514 (1996), this Court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. *Accord State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996); *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Morin*, 100 Wn. App. 25, 29, 99 P.2d 113 (2000); and *State v. Ames*, 89 Wn. App. 702, 710, n. 8, 950 P.2d 514 (1998). This is "an established principle of state constitutional jurisprudence," and no analysis under *State v. Gunwall,* 106 Wn. 2d 54, 720 P.2d 808 (1986) is necessary. *Roberts*, 142 Wn.2d at 506, n.11.

Washington's constitution was adopted in 1889 by a constitutional convention of delegates who borrowed heavily from the constitutions of other states, rather than from the U.S. Constitution.[38] This history makes it

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[37] The constitutions of fifteen of the thirty-six states that inflict capital punishment have prohibitions against "cruel and unusual punishments." An additional fourteen proscribe cruel "or" unusual punishments, and five bar "cruel" punishments. Two states have no analogous textual provisions. James R. Acker and Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 Vand. L. Rev. 1299, 1321 (1989).

[38] Robert Utter & Hugh Spitzer, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE AT P. 9 (2002) ("Utter & Spitzer").

highly unlikely that the drafters of art. I, §14 intended the clause to have the same meaning as the Eighth Amendment.[39] The trial court's conclusion that the state Cruel Punishment Clause is no different than the Eighth Amendment is erroneous.

### 2. Washington's Capital Punishment System, including the Method of Execution, Flunks the "Evolving Standards of Decency" Test.

Justice Sanders has recognized that, at the time of the ratification of the Washington constitution, "cruelty" was generally understood to mean more than torture or barbaric punishments. It included the concept of the "unnecessary" infliction of pain. *State v Rivers, supra*, 129 Wn.2d at 723-24 (Sanders, J., dissenting).[40] This is a test broader than that adopted in *Baze*.

The record in this case demonstrates that fallible humans will be responsible for carrying out the lethal injections in Washington, and that therefore there is a risk of human error in this part of the process, creating an unacceptable risk of the infliction of unnecessary pain. Problems with the administration of lethal injections have arisen, not only because of concerns that the inmate has not been adequately anesthetized, but also

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[39] Utter & Spitzer at p. 3-4.

[40] This standard appears well accepted, both by DOC and by the courts. *See* RP 73 ("Humane" means "not subject to unnecessary risk of pain or harm); *Morales v. Tilton, supra*, 465 F. Supp.2d at 973 (California has duty to adopt lethal injection procedures that do not create an unnecessary risk of the infliction of pain).

because of the inadequacy of the training of the individuals performing the injections. Since 1985, at least 32 lethal injections nationwide have been prolonged because executioners have been unable to find suitable veins in which to inject the drugs. There are well-known and well-publicized reports of inmates who experienced excruciating pain because the drugs were not injected into the IV in the correct order.[41]

But evaluating whether a punishment is unconstitutionally cruel involves more than determining whether the framers of our state constitution would have considered it cruel in 1889. The original meaning of the Cruel Punishment Clause must be supplemented by contemporary values, "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); *see also Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L.E.d2d 335 (2002); *Kennedy v. Louisiana*, 129 S. Ct. 1, 171 L.Ed.2d 932, 77 U.S.L.W. 3194 (2008). The Court should evaluate a punishment "in the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962).

Execution methods found constitutional at one point have later been struck down under evolving standards of decency. As society has recognized that the technological advancements of electricity and gas could not

[41] Seema Shah, *supra*, at 1106.

deliver swift or painless death, these methods of execution have been rejected – either by legislatures or courts. *See Fierro v. Gomez*, 77 F.3d 301, 307 (9th Cir. 1996), *vac'd* (for consideration under a new lethal injection statute), 519 U.S. 918, 117 S. Ct. 285, 136 L.Ed.2d 204 (1996) (California's gas chamber is unconstitutionally cruel because persistence of consciousness of one minute or more during the execution process outside bounds of Eighth Amendment); *Rupe v. Wood*, 863 F. Supp. at 1313 (Washington's hanging protocol violated Eighth Amendment).

Many judges facing lethal injection cases have reached the conclusion that it is impossible to constitutionally carry out the death penalty. *See Callins v. Collins*, 510 U.S. 1141, 1145, 114 S. Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting) (faced with Callins' execution by lethal injection and the numerous systemic defects in carrying out the death penalty (including racial and economic disparities and lack of consistency and proportionality), Justice Blackmun concluded that "the death penalty experiment has failed. ... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."); *Baze v. Rees*, 553 U.S. 35, 128 S. Ct. 1520, 1543-47, 170 L.Ed.2d 420 (2008) (Stevens, J., concurring) (appalled by aspects of a lethal injection

execution, despite its portrayal as innocuous; death penalty no longer served the societal purposes of incapacitation, deterrence or retribution); *State v. Webb*, 252 Conn. 128, 149-50, 750 A.2d 448 (2000) (Katz, J., dissenting) (whether carried out by impalement or electrocution, crucifixion or the gas chamber, firing squad or hanging, lethal injection or some other method yet to be designed, the very quintessence of capital punishment is cruelty).[42]

### 3. The Same Systemic Defects Cited by Judges in Lethal Injection Cases are Present in Washington.

The record in this case, and the examples of botched lethal injection executions discussed above, provide clear evidence that fallible humans will be responsible for carrying out the lethal injections of the Petitioners, and that therefore there is a risk of human error in this part of the process. But the risk of a botched execution is not the only human error that will taint these executions if they are allowed to proceed. The following other systemic defects have also been recognized as applicable to Washington's capital punishment system.

#### a. Impossibility of Proportionality and Increased Arbitrariness

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[42] *See also*, *State v. Cobb*, 251 Conn. 285, 522-30, 743 A.2d 1 (1999), (Berdon, J., dissenting) ("Because the law evolves continuously as a result of changes in the personnel of the court or as a result of justices who revise their positions, ... the imposition of the death penalty has no place in a civilized democratic society. It embodies an arbitrariness that cannot be tolerated when the state determines who should live and who should die.")

Four justices of this Court, in dissent, concluded that since the "worst of the worst" murderers in Washington had escaped the death penalty, "[t]hese cases exemplify the arbitrariness with which the penalty of death is exacted. They are symptoms of a system where statutory comparability defies rational explanation." *State v. Cross*, 156 Wn.2d 580, 641-42, 648-52, 132 P.3d 80 (2006) (C. Johnson, J., dissenting). "Reviewing the history of this court's proportionality review reveals how the administration of capital cases defies any rational analysis." *Cross*, 156 Wn.2d at 641.

Justices Marshall and Brennan, concurring in *Godfrey v. Georgia*, 446 U.S. 420, 439-40, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980), also recognized that the capital punishment was fraught with arbitrariness, rendering it unconstitutional. The arbitrariness of the death penalty has only increased since Justices Marshall and Brennan's observations in 1980. In 2007, dissenting Judge Martin in *Benge v. Johnson*, 474 F.3d 236, 254-55 (6th Cir. 2007) agreed with the *Cross* dissent that implementation of the death penalty had become unconstitutionally arbitrary. Three judges of the Third Circuit, in dissent in *Flamer v. State of Delaware*, 68 F.3d 736, 772 (3rd Cir. 1995), also agreed that the capital punishment system had become so complex and irrational as to render it unconstitutional. Dissenting New Jersey Supreme Court Justice Long also concluded that the lack of a fair proportionality review in implementation of the death penalty rendered the

death penalty unconstitutional under New Jersey's more protective state constitution. *State v. Timmendequas*, 168 N.J. 20, 773 A.2d 18, 50-51, 78-79 (2001).

**b. The Cruel Punishment Clause Bars Carrying out Executions that are Necessarily Tainted by Racial Bias and Other Unjustified Disparities.**

Justice Blackmun in *Callins*, *supra*, Justice Stevens in *Baze*, *supra*, Justices Marshall and Brennan, concurring in *Godfrey v. Georgia*, *supra*, 446 U.S. at 439, and Judge Martin dissenting in *Benge*, 474 F.3d at 257-58, have all expressed their conclusion that the death penalty is unconstitutional because it has been impossible to remove the taint of racial bias. There is growing evidence that death sentences in this state are in fact imposed in a racially discriminatory manner. *See*, Analysis of race of the victim in Washington cases where prosecutors have sought the death penalty, conducted by Professor David Baldus of the University of Iowa School of Law and previously submitted in the ACLU amicus brief in this Court in Mr. Stenson's PRP case, Case No. 82332-4. This statistical evidence was recently corroborated by the Ninth Circuit in *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010) in which the Court discussed undisputed evidence of racial bias in Washington's criminal justice system. The racial bias in this state's death penalty system demonstrates a systemic defect that cannot be ignored.

### c. The Cruel Punishment Clause prohibits any sentence lacking a corresponding public benefit that could not be achieved by a less severe sanction.

A final basis for concluding that the systemic defects in Washington's capital punishment system are too numerous to render it constitutional is that while the costs of the death penalty system, including lethal injection are great, the exact same benefit to the public can be achieved through the lesser penalty of life without parole. Several judges who have concluded the death penalty should be ruled unconstitutional have made this point. *See State v. Brown*, 138 N.J. 481, 593, 651 A.2d 19 (1994) *overruled in part on other grounds by State v. Cooper*, 151 N.J . 326, 700 A.2d 306 (1997) (Handler, J., concurring and dissenting); and *Cobb*, *supra*, 251 Conn. at 539-40 (Berdon, J., dissenting and, quoting from Justice Brennan, explaining that the lack of valid purposes served by capital punishment rendered it unconstitutionally cruel).

Wash. const. art. I, § 14 does more than limit the method of punishment; there must be some public good advanced by the punishment inflicted that could not be achieved by a less severe sanction. *See*, *Rivers*, 129 Wn.2d at 728 (Sanders, J., dissenting). Yet neither of the goals alleged to justify the death penalty-- deterrence of murder by prospective offenders and retribution (*Roper v. Simmons*, 543 U.S. 551, 571, 125 S.Ct. 1183, 161 L.Ed..2d 1 (2005)) -- are served in Washington.

A recent study found "no empirical support for the argument that the existence or application of the death penalty deters prospective offenders from committing homicide."[43] [44] As to retribution and the claim that society must send a message that a life will be forfeited if you take a life, there is no method to objectively test the validity of this argument. The argument would also support **any** harsh penalty, including punishments outlawed as excessively inhumane, such as beheading, drawing and quartering, or disemboweling.

Respectfully submitted this 2nd day of March, 2010.

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[43] *See* Tomislav V. Kovandzic, Lynne M. Vieraitis & Denise Paquette Boots, "Does the death penalty save lives? New evidence from state panel data, 1977 to 2006," 8 CRIMINOLOGY & PUBLIC POLICY 803 (2009).

[44] The absence of any deterrent effect is well known by law enforcement in this State. T. McConn, "*Death penalty divides local law enforcers*," Walla Walla Union-Bulletin, November 11, 2009. For a collection of studies relating to deterrence and the death penalty, *see* http://www.deathpenaltyinfo.org/discussion-recent-deterrence-studies. There is simply no evidence that execution by lethal injection will deter murder or other violent crime. Thus, the punishment does not serve this public goal.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed by Skellenger Bender, P.S., and make this declaration of my personal knowledge.

2. I certify that I served a copy of the foregoing document on all parties or their counsel of record via electronic mail and U.S. Mail, postage prepaid thereon, as follows:

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3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3rd day of March, 2010, at Seattle, Washington.

Rosemarie Robinson

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# APPENDIX 1

some suitable person may be appointed by the county commissioners to perform the duties of either of said offices: *Provided*, That in case there is no board of county commissioners, the governor may, on notice of such vacancy, create or fill such board.

SEC. 6. Every such person so appointed, in pursuance of either of the last two preceding sections, shall before proceeding to execute the duties assigned them, qualify in the same manner as required by law of the officers in whose place they shall be appointed; and they shall continue to exercise and perform the duties of the office to which they shall be so appointed, until such vacancy shall be regularly supplied as provided by law.

SEC. 7. This act shall be in force and take effect from its passage.

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## AN ACT RELATIVE TO CRIMES AND PUNISHMENTS, AND PROCEEDINGS IN CRIMINAL CASES.


I. *Of the rights of persons accused of crimes and offenses.*
II. *Of offenses against the lives and persons of individuals.*
III. *Of offenses against property.*
IV. *Of offenses against public peace.*
V. *Of offenses against public justice, and by and against public officers.*
VI. *Of offenses against public policy.*
VII. *Of offenses against morality and decency.*
VII. *Of offenses against public health.*
IX. *Of principals and accessories.*
X. *General provisions relative to crimes and punishments.*


### I. OF THE RIGHTS OF PERSONS WHO ARE ACCUSED OF CRIMES AND OFFENSES.


SEC. 1. No person to be tried unless indicted, except before a justice of the peace or court martial.
2. Rights of the accused on trial, to face witnesses, &c.
3. No person to be convicted except by jury or on confession.
4. No person to be tried the second time for the same offense.
5. When a second trial for the same offense may be had.
6. Punishment shall not be inflicted without conviction.
7. Provisions for a speedy trial; when prisoner may be discharged.
8. All offenses bailable, except murder.
9. No person to be tried for an offense unless prescribed by statue.
10. Limitation of prosecutions. Proviso.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That no person shall be held to answer in any court for an alleged crime or offense unless upon indictment by a grand jury, except in proceedings before a justice of the peace, or before court martial.

SEC. 2. On the trial of any indictment, the party accused, shall have the right to be heard by himself or counsel, to meet the witnesses produced against him face to face, and he shall have the right to produce witnesses and proofs in his favor, and have compulsory process to compel the attendance of witnesses in his behalf, and to a speedy, public trial by an impartial jury.

SEC. 3. No person indicted for an offense, shall be convicted thereof unless by confession of his guilt in open court, or by the verdict of a jury accepted and recorded in open court.

SEC. 4. No person shall be held to answer on a second indictment for an offense of which he has been acquitted by a jury upon the facts and merits on a former trial, but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the former, or in the substance of the indictment on which he was acquitted.

SEC. 5. If any person indicted for an offense, shall, on his trial, be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form, or to the substance of the indictment, he may be arraigned on a new indictment, and may be tried and convicted for the same offense, notwithstanding such former acquittal, except where such former charge was a capital offense.

SEC. 6. No person charged with any offense against the law, shall be punished for such offense, unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case, and of the person.

SEC. 7. Every person held in prison on indictment, shall, if he require it, be tried at the next term of the court after the time he was imprisoned, or shall be bailed on his own recognizance, and every person held in prison on any charge of having committed an offense shall be discharged, if he be not indicted before the end of the first term of the court at which he is held to answer, unless it shall appear to the satisfaction of the court that the witnesses on the part of the territory have been enticed or kept away, or are detained and prevented from attending the court by sickness or some inevitable accident.

SEC. 8. Every person charged with an offense except that of murder in the first degree where the proof is evident, or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided in this act.

SEC. 9. No person shall be held liable to answer criminally for any offense, unless prescribed by statute.

SEC. 10. Prosecutions for the offenses of murder and arson where death ensues, may be commenced at any period after the commission of the offense, or offenses, the punishment of which may be by imprisonment in the penitentiary, within three years after their commission, and for all other offenses within one year after their commission: *Provided*, That any length of time during which the party charged, was not usually and publicly resident within the territory, shall not be reckoned within the one and three years respectively; and further provided, that where a person has been indicted within the period during which the indictment might be found, if the indictment be quashed, the time of limitation shall be computed from the quashing of such indictment.

## II. OF OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.


SEC. 11. Felony defined; what are misdemeanors.
12. Murder defined.
Pardoning power not prevented.
13. Murder in the second degree defined.
Punishment.
14. The survivor in a duel guilty of murder in the second degree.
15. Duels fought without the territory, deemed within when the appointment is so made.
16. Manslaughter defined.
17. Assisting self-murder deemed manslaughter.
18. Endangering the lives of passengers on vessels deemed manslaughter.
19. When captain, engineer, or other person on a steamboat deemed guilty of manslaughter.
20. Second in a duel guilty of manslaughter.
21. Punishment for manslaughter.
22. Punishment for engaging in a duel.
23. Punishment for carrying or accepting a challenge; being present at, encouraging, or promoting a duel.
24. Punishment for giving poison when not fatal.
25. Punishment for poisoning food, drink, spring or well.
26. Malicious mayhem and punishment therefor.
27. Assault and battery with malicious intent.
Punishment therefor.
28. Punishment for assault and battery when the offender has a pistol.
29. Assault and battery.
Punishment therefor.
30. Punishment for exhibiting a dangerous weapon.
31. Punishment for attempting to commit murder not by assault and battery.
32. Simple mayhem.
Punishment therefor.
33. Rape; punishment therefor.
Evidence of the crime.
34. Robbery.
Punishment therefor.

35. Kidnapping.
Punishment therefor.
36. Offenses mentioned in the preceding section may be tried where the offender is taken.
When the consent of the person taken shall be considered a defense.
37. Punishment for destroying a child in the womb or at its birth.
38. Punishment for causing a miscarriage.
39. Extortion of money &c., punished.

Sec. 11. All offenses which may be punishable by imprisonment in the penitentiary, are felonies; and all other offenses are misdemeanors.

Sec. 12. Every person who shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death. But this shall in no case prevent the exercise of the pardoning power of the governor, or the authority to commute the punishment from that of death to imprisonment for life.

Sec. 13. Every person who shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof, shall be imprisoned in the penitentiary, for a term of not less than ten, nor more than twenty years, and kept at hard labor.

Sec. 14. If either party to a duel be killed, the survivor shall be deemed guilty of murder in the second degeee.

Sec 15. If any person shall by previous appointment made within, fight a duel without this territory, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured, shall die, such person so offending shall be deemed guilty of murder in the second degree, within any county in this territory.

Sec. 16. Every person who shall unlawfully kill any human being without malice express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter.

Sec. 17. Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter.

Sec. 18. Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such a quantity of other lading, that, by means thereof, such boat or vessel shall sink or oversot, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter.

Sec. 19. If the captain, or any other person having charge of any steamboat used for the conveyance of passengers, or if the engineer or

other person having charge of the boiler of such boat, or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking any person shall be killed, every such captain, engineer, or other person, shall be deemed guilty of manslaughter.

SEC. 20. Any person who shall be present at a duel as a second, when either party thereto shall be killed, or a mortal wound inflicted, and whereof death shall ensue, shall be deemed guilty of manslaughter.

SEC. 21. Any person convicted of manslaughter shall be punished by imprisonment in the penitentiary, not less than one year, nor more than twenty years, and shall be fined in any sum not exceeding five thousand dollars.

SEC. 22. Every person who shall engage in a duel with any deadly weapon, although no homicide ensue, or shall challenge another to fight a duel, or shall send or deliver any written or verbal message, purporting or intending to be such challenge, although no duel ensue, shall be imprisoned, on conviction thereof, in the penitentiary, not more than ten years, nor less than one year.

SEC. 23. Every person who shall accept such challenge, or who shall knowingly carry or deliver any such challenge or message, whether a duel ensue or not, and every person who shall be present at the fighting of a duel with deadly weapons, as an aid, or second, or who shall advise, encourage, or promote such duel, shall on conviction thereof, be imprisoned in the penitentiary, not more than five years, nor less than six months.

SEC. 24. Every person who shall administer, or procure to be administered, any poison to any other human being, with intent to kill the person to whom the same shall be administered, if death do not ensue, upon conviction thereof, shall be imprisoned in the penitentiary not more than twenty years, nor less than two years.

SEC. 25. Every person who shall mingle poison with any food, drink, or medicine, with intent to injure any human being, or who shall poison any spring, well, or reservoir of water, with such intent, shall, upon conviction thereof, be imprisoned in the penitentiary not more than fourteen years, nor less than one year.

SEC. 26. Every person who on purpose, and of malice aforethought, shall unlawfully disable the tongue, put out an eye, cut or bite off the nose, ear, lip, or other member of any person, with intent to disfigure or disable such person, shall be deemed guilty of malicious mayhem, and upon conviction thereof, shall be imprisoned in the penitentiary not more than fourteen

# APPENDIX 2

he could not have discovered with reasonable diligence and produced at the trial.

4th. Accident or surprise.

5th. Admission of illegal testimony and misdirection of the jury by the court, in a material matter of law, excepted to at the time.

6th. When the verdict is contrary to law and evidence, but not more than two new trials shall be granted for these causes alone.

SEC. 131. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding sections, the facts on which it is based, shall be set out in an affidavit.

SEC. 132. Judgment may be arrested on the motion of the defendant, for the following causes:

1st. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.

2d. That the facts as stated in the indictment, do not constitute a crime or misdemeanor.

SEC. 133. The court may also on its views of any of these defects, arrest the judgment without motion.

SEC. 134. When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted, or admitted to bail anew, to answer a new indictment.

SEC. 135. Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced.

## XIV. OF JUDGMENTS AND EXECUTIONS.

SEC. 136. Court must pronounce judgment.
137. When defendant must be present.
When he may be absent for the purpose of judgment.
138. When defendant is not present his arrest may be ordered.
139. Defendant must be asked to show cause why judgment should not be pronounced against him.
140. When a bench warrant shall issue.
141. Defendant to be kept in custody until fine and costs are paid.
142. Execution may issue against defendants property.
143. Persons convicted may be recognized to keep the peace.
144. Action may be had on recognizance in case of a breach of the peace.
145. Execution for costs and fines may be stayed.
146. Clerk to approve the sureties for stay.
Execution may issue upon forfeiture of bond against defendant and bail, and against defendant's body.
147. Where fine and costs are not paid, defendant must be imprisoned one day for every three dollars.
148. A transcript of the minutes of the court to be made out in case of conviction.
149. The forms of punishment where imprisonment in the penitentiary is awarded.
150. Provisions where there is no place of imprisonment.

Laws of Washington 1854



151. Defendant may work out his fine and costs, and his term of imprisonment.
152. Death warrant to be delivered to the sheriff.
What it shall state; limit of time.
153. Death to be by hanging.
154. Sheriff to make return of the warrant, &c.
155. When the time for the execution passes, the court may appoint a day.
156. Final record, how made, &c.

SEC. 136. After verdict of guilty, or finding of the court against the defendant, if the judgement be not arrested, or a new trial granted, the court must pronounce judgment.

SEC. 137. For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him, to secure the payment of the judgment and costs; judgment may then be rendered in his absence.

SEC. 138. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in this territory, as a warrant of arrest in other cases.

SEC. 139. When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him.

SEC. 140. If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

SEC. 141. When the defendant is adjudged to pay any fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured, as is provided by law.

SEC. 142. Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions.

SEC. 143. Every court before whom any person shall be convicted upon an indictment for any offense not punishable with death or imprisonment in the penitentiary, may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum, to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize.

SEC. 144. In case of the breach of the conditions of any such recognizance, the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace.

SEC. 145. Every defendant against whom a judgment has been rendered for fine and costs, may stay the execution for the fine assessed, and costs, for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter into a recognizance in open court, acknowledging themselves to be bail for the fine and costs.

SEC. 146. Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment, and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this act, in committal for default to pay or secure the fine and costs.

SEC. 147. If any person ordered into custody until the fine and costs adjudged against him, shall not before the final adjournment of the court, pay or cause the payment of the same to be secured, the clerk of the court shall issue a warrant to the sheriff, commanding him to imprison such defendant in the county jail until such fine and costs are paid or secured, or until he has been imprisoned in such jail one day for every three dollars of such fine or costs, but execution may at any time issue against the property of the defendant, as in other cases.

SEC. 148. When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, and he shall execute it accordingly.

SEC. 149. In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at one time; and the execution of such punishment, the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.

SEC. 150. If there shall be no penitentiary in the territory, or other prisons, the court may order the prisoner to be imprisoned in any county jail, if there be one, or any other place of confinement within the territory, at the expense of the territory; and if there is no county jail or county prison, the court may order the defendant, sentenced to the county jail, to be confined in the penitentiary, if there be one, or in any county jail, or other place of confinement in the territory, at the expense of the county in which the conviction was had.



SEC. 151. When a defendant is committed to jail on failure to pay any fine or costs, if there be no such jail, he shall, under the order of the county commissioners, work out the amount of such fine and costs, at the rate of three dollars for every day's labor, and if there be a county jail, he may elect so to do; and in case he shall so work out his fine and cost, no execution shall issue therefor. When any defendant is in the custody of the sheriff, by virtue of a sentence to imprisonment in the county jail, and there be no county jail in the county, he may under order of the county commissioners, cause such person to work out his unexpired term of imprisonment, in such manner as they may direct.

SEC. 152. When judgment of death is rendered, a warrant signed by the judge, and attested by the clerk under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed; which shall not be less than thirty, nor more than ninety days from the time of judgment.

SEC. 153. The punishment of death prescribed by law must be inflicted by hanging by the neck.

SEC. 154. The sheriff shall return and file with the clerk, the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

SEC. 155. Whenever the time appointed for the execution of sentences on a prisoner shall have passed, either by reason of the sueing out of a writ of error, or the taking of an appeal, or from the escape of the prisoner, or from any other cause, the district court on the return of the judgment affirmed, or at any term of the court when the prisoner shall be brought before them, shall proceed to appoint a day for the carrying into effect of the sentence of death.

SEC. 156. The clerk of the district court shall make a final record of all the proceedings in a criminal prosecution, within six months after the same shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment, journal entries, pleadings, minutes of challenges to panel petit jurors, judgment, orders, or decision, and bill of exceptions.

## XV. OF SUITS OF ERROR AND APPEALS.

SEC. 157. Re-examination may be had in the district and supreme court, within one and two years. When the writ may be sued out by defendant; when by the territory.
158. Appeals may also be taken as provided above, at the term of court when judgment was rendered.
159. How writs of error may be sued out and served.
160. Defendant entitled to a transcript of the record; what it shall be.

# APPENDIX 3

# LAWS

OF THE

# TERRITORY OF WASHINGTON,

ENACTED BY THE

## LEGISLATIVE ASSEMBLY

IN THE YEAR A. D. 1873,

TOGETHER WITH

## Joint Resolutions and Memorials.

*Published by Authority.*

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1873.

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plaintiff, against ——, defendant, find the defendant (guilty or not guilty, as the case may be.) (Signed,) A. B., Foreman.

SEC. 265. When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.

## CHAPTER XXIII.

### OF NEW TRIALS AND ARRESTS OF JUDGMENT.

SEC. 266. An application for a new trial must be made before judgment, and may be granted for the following causes:

1. When the jury has received any evidence, paper, document or book not allowed by the court, to the prejudice of the substantial rights of the defendant.
2. Misconduct of the jury.
3. For newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial.
4. Accident or surprise.
5. Admission of illegal testimony and misdirection of the jury by the court, in a material matter of law, excepted to at the time.
6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone.

SEC. 267. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit.

SEC. 268. Judgment may be arrested on the motion of the defendant for the following causes:



1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.
2. That the facts as stated in the indictment do not constitute a crime or misdemeanor.

SEC. 269. The court may also, on its view of any of these defects, arrest the judgment without motion.

SEC. 270. When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense, properly charged, the court may order the defendant to be re-committed, or admitted to bail anew, to answer a new indictment.

SEC. 271. Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced.

## CHAPTER XXIV.

### OF JUDGMENTS AND EXECUTIONS.

SEC. 272. After verdict of guilty, or finding of the court against the defendant, if the judgment be not arrested, or a new trial granted, the court must pronounce judgment.

SEC. 273. For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence.

SEC. 274. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in

any county in this Territory, as a warrant of arrest in other cases.

SEC. 275. When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him.

SEC. 276. If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

SEC. 277. When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law.

SEC. 278. Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions.

SEC. 279. Every court before whom any person shall be convicted upon an indictment for an offense not punishable with death or imprisonment in the penitentiary may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum, to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize.

SEC. 280. In case of the breach of the conditions of any such recognizance, the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace.

SEC. 281. Every defendant against whom a judgment has been rendered for fine and costs, may stay the execution for the fine assessed, and costs, for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter



into a recognizance in open court, acknowledging themselves to be bail for such fine and costs.

SEC. 282. Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment, and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this act, in committal for default to pay or secure the fine and costs.

SEC. 283. If any person ordered into custody until the fine and costs adjudged against him, shall not, before the final adjournment of the court, pay or cause the payment of the same to be secured, the clerk of the court shall issue a warrant to the sheriff, commanding him to imprison such defendant in the county jail until such fine and costs are paid or secured, until he has been imprisoned in such jail one day for every three dollars of such fine or costs, but execution may at any time issue against the property of the defendant, as in other cases.

SEC. 284. When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.

SEC. 285. In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at one time; and in the execution of such punishment the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.

SEC. 286. If there shall be no penitentiary within the Territory, or other prisons, the court may order the prisoner to be imprisoned in any county jail, if there be one, or any other place of confinement within the Territory, at the expense of the Territory; and if there is no county jail or county prison, the court may order the defendant, sentenced to the county jail, to be confined in the penitentiary, if there be one, or in any county jail, or other place of confinement in the Territory, at the expense of the county in which the conviction was had.

SEC. 287. When a defendant is committed to jail on failure to pay any fine or costs, if there be no such jail, he shall, under the order of the county commissioners, work out the amount of such fine and costs, at the rate of three dollars for every day's labor, and if there be a county jail, he may elect so to do; and in case he shall so work out his fine and costs, no execution shall issue therefor. When any defendant is in the custody of the sheriff, by virtue of a sentence of imprisonment in the county jail, and there be no county jail in the county, he shall, under order of the county commissioners, who shall make such order, cause such person to work out his unexpired term of imprisonment, in such manner as they may direct.

SEC. 288. When judgment of death is rendered, a warrant signed by the judge and attested by the clerk under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed, which shall not be less than thirty nor more than ninety days from the time of judgment. And the sheriff or officer to whom said warrant was delivered shall return the same within twenty days after the time fixed for the execution.

SEC. 289. The punishment of death prescribed by law must be inflicted by hanging by the neck.

SEC. 290. The sheriff shall return and file with the clerk the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.



SEC. 291. Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect of the sentence of death.

SEC. 292. The clerk of the district court shall make a final record of all the proceedings in a criminal prosecution, within six months after the same shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment, journal entries, pleadings, minutes of challenges to panel of petit jurors, judgment, orders or decision, and bill of exceptions.

## CHAPTER XXV.

### ACTIONS ON FORFEITED RECOGNIZANCES.

SEC. 293. In criminal cases where a recognizance for the appearance of any person, either as a witness or to appear and answer, shall have been taken and a default entered, the recognizance shall be declared forfeited by the court, and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments.

SEC. 294. The parties, or either of them, against whom such judgment may be entered in the district or supreme courts, may stay said execution till the next regular term of the court in which such judgment is entered, by giving a bond with two or more sureties, to be approved by the clerk, conditioned for the payment of such judgment after the adjournment of such succeeding term of court, unless the same shall be vacated before the end of such term.

# APPENDIX 4

code of Washington, containing
all Acts of a General Nature

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REVISED AND AMENDED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, DURING THE EIGHTH BIENNIAL SESSION, AND THE EXTRA SESSION, ENDING DECEMBER 7, 1881; THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERETO; THE ACTS OF CONGRESS APPLICABLE TO THE TERRITORY OF WASHINGTON; AND THE NATURALIZATION LAWS.

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1881.

acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge, or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged.

SEC. 1102. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.

SEC. 1103. When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form:

"We, the jury, in the case of the territory of Washington, plaintiff, against ——, defendant, find the defendant (guilty or not guilty, as the case may be.) (Signed,) A B, foreman."

SEC. 1104. When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.

## CHAPTER LXXXVIII.

### OF NEW TRIALS AND ARREST OF JUDGMENT.


SECTION
1105. Application must be made before judgment.
1105. Causes for which may be granted.
1106. In certain cases affidavit required.
1107. Arrest of judgment; ground for motion.
1108. Court may arrest judgment without motion.
1109. Defendant may be recommitted or admitted to bail.
1110. Exceptions may be taken as in civil cases.


SEC. 1105. An application for a new trial must be made before judgment, and may be granted for the following causes:

1. When the jury has received any evidence, paper, document or book not allowed by the court, to the prejudice of the substantial rights of the defendant.

2. Misconduct of the jury.

3. For newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial.

4. Accident or surprise.

5. Admission of illegal testimony and misdirection of the jury by the court, in a material matter of law, excepted to at the time.

6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone.

SEC. 1106. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit.

SEC. 1107. Judgment may be arrested on the motion of the defendant for the following causes:

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.



2. That the facts as stated in the indictment do not constitute a crime or misdemeanor.

SEC. 1108. The court may also, on its view of any of these defects, arrest the judgment without motion.

SEC. 1109. When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense, properly charged, the court may order the defendant to be re-committed, or admitted to bail anew, to answer a new indictment.

SEC. 1110. Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced.

## CHAPTER LXXXIX.

### JUDGMENTS, FINES AND EXECUTIONS.


SECTION
1111. For fines, liens upon defendant's real estate.
1112. Defendant may have stay of execution.
1113. To be paid to county treasurer.
1114. When court must pronounce judgment.
1115. Of imprisonment, defendant must be present.
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1116. If defendant not present, court may issue warrant.
1117. When defendant appears for judgment, court must inform him of verdict.
1118. If defendant do not appear for judgment, court may issue bench warrant.
1119. Defendant may be committed until fines and costs are paid.
1120. Execution against property for fine and costs.
1121. Defendants may also be recognized to keep the peace.
1122. Proceedings in breach of recognizance.
1123. Stay of execution for sixty days.
1124. Sureties to be approved by clerk.
1125. In case of failure to pay fines and costs, defendant may be ordered into custody.
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1127. Form of sentence of imprisonment.
1128. If there is no penitentiary in the territory.
1129. Defendant committed, must work out fine.
1130. Requisites of warrants in case of death.
1131. Punishment of death must be by hanging.
1132. Sheriff must return death warrant.
1133. Proceeding when time passed for execution.
1134. Clerk to make final record of proceedings in all criminal proceedings.
1135. Fines and forfeitures belong to counties from which defendant came.
1136. Governor may commute sentences, grant respites.


SEC. 1111. Judgments for fines in all criminal actions rendered, are, and may be made liens upon the real estate of the defendant in the same manner, and with like effect as judgments in civil actions.

SEC. 1112. The defendant may have a stay of execution for the same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein.

SEC. 1113. All fines imposed on any person by the provisions of this code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the general county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received, shall, upon conviction thereof, be fined in four fold the amount of such fines so received.

SEC. 1114. After verdict of guilty, or finding of the court against the defendant, if the judgment be not arrested, or a new trial granted, the court must pronounce judgment.

SEC. 1115. For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence.

SEC. 1116. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in this territory, as a warrant of arrest in other cases.

SEC. 1117. When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him.

SEC. 1118. If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench warrant for his arrest.

SEC. 1119. When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law.

SEC. 1120. Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions.

SEC. 1121. Every court before whom any person shall be convicted upon an indictment for an offense not punishable with death or imprisonment in the penitentiary may, in addition to the punishment prescribed by law, require such person to recognize with sufficient sureties in a reasonable sum, to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize.

SEC. 1122. In case of the breach of the conditions of any such recognizance, the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace.

SEC. 1123. Every defendant against whom a judgment has been rendered for fine and costs, may stay the execution of for the fine assessed and costs for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter into a recognizance in open court, acknowledging themselves to be bail for such fine and costs.

SEC. 1124. Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment, and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this act, in committal for default to pay or secure the fine and costs.

SEC. 1125. If any person, ordered into custody until the fine and costs adjudged against him, [be paid] shall not before the final adjournment of the court, pay or cause the payment of the same to be secured, the clerk of the court shall issue a warrant to the sheriff, commanding him to imprison such defendant in the county jail until such fine and costs are paid or secured until he has been imprisoned in such jail one day for every three dollars of such fine or costs, but execution may at any time issue against the property of the defendant, as in other cases. [See Sec. 1129, infra.]

SEC. 1126. When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.



SEC. 1127. In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary shall precede the punishment by hard labor, unless the court shall otherwise order.

SEC. 1128. If there shall be no penitentiary within the territory, or other prisons, the court may order the prisoner to be imprisoned in any county jail, if there be one, or any other place of confinement within the territory, at the expense of the territory; and if there is no county jail or county prison the court may order the defendant sentenced to the county jail, to be confined in the penitentiary, if there be one, or in any county jail, or other place of confinement in the territory, at the expense of the county in which the conviction was had.

SEC. 1129. When a defendant is committed to jail on failure to pay any fine or costs he shall under the order of the county commissioners work out the amount of the fine and costs at the rate of three dollars per day; and in case he shall so work out the fine and costs or in case he shall not be able to work, or the county commissioners fail to provide work, and he shall have been confined in the county jail one day for every three dollars of such fine and costs no execution shall issue therefor. When any defendant is in the custody of the sheriff by virtue of a sentence of imprisonment in the county jail, and there be no county jail in the county, he shall, under the order of the county commissioners, cause such person to work his unexpired term of imprisonment in such manner as said county commissioners may direct.

SEC. 1130. When judgment of death is rendered, a warrant signed by the judge and attested by the clerk under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed, which shall not be less than thirty nor more than ninety days from the time of judgment. And the sheriff or officer to whom said warrant was delivered shall return the same within twenty days after the time fixed for the execution.

SEC. 1131. The punishment of death prescribed by law must be inflicted by hanging by the neck.

SEC. 1132. The sheriff shall return and file with the clerk the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence.

SEC. 1133. Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect of the sentence of death.

SEC. 1134. The clerk of the district court shall make a final record of all the proceedings in a criminal prosecution, within six months after the same shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment, jour-

# APPENDIX 5

SEC. 139. *Proof of Death and of Killing by Defendant.*

Proof of death.

No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts beyond a reasonable doubt.

SEC. 140. *Murder in the First Degree.*

Murder in the first degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

1. With a premeditated design to effect the death of the person killed, or of another; or

2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or

3. Without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Murder in the first degree shall be punished by death or by imprisonment in the state penitentiary for life, in the discretion of the court.

SEC. 141. *Murder in the Second Degree.*

Murder in the second degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when—

1. Committed with a design to effect the death of the person killed or of another, but without premeditation; or

2. When perpetrated by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony other than those enumerated in section 140 of this act.



Murder in the second degree shall be punished by imprisonment in the state penitentiary for not less than ten years.

SEC. 142. *Killing in Duel.*

Killing in duel.

Every person who shall fight or participate in, as second or assistant, any duel within this state, in which any person is killed, or who, by previous appointment made within this state, shall fight or participate in, as second or assistant, any duel out of the state, in which any person is killed, shall be guilty of murder in the second degree; and, in the latter case, may be proceeded against in any county in this state.

SEC. 143. *Manslaughter.*

Manslaughter.

In any case other than those specified in sections 140, 141 and 142 of this act, homicide, not being excusable or justifiable, is manslaughter.

Manslaughter is punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

SEC. 144. *Killing Unborn Quick Child.*

Killing unborn quick child.

The willful killing of an unborn quick child, by any injury committed upon the mother of such child, is manslaughter.

SEC. 145. *Killing Unborn Quick Child by Administering Drugs.*

Producing miscarriage.

Every person who shall provide, supply or administer to a woman, whether pregnant or not, or shall prescribe for or advise or procure a woman to take any medicine, drug or substance, or shall use or employ, or cause to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman or of any quick child of which she is pregnant is thereby produced, shall be guilty of manslaughter.

# APPENDIX 6

ton: and whereas, the subject matter of said entitled act is the same as covered by certain provisions of this act, and this act is the latest legislative declaration upon the subject matter contained therein, it is hereby declared that the prior emergency act aforesaid be, and the same shall be repealed upon the taking effect of this act, but said prior act shall remain in full force and virtue until the time when this act shall become effective.

Passed the House February 13, 1913.
Passed the Senate March 11, 1913.
Approved by the Governor March 22, 1913.

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## CHAPTER 166.

[H. B. 48.]

### APPROPRIATION FOR BUREAU OF STATISTICS.

AN ACT making an appropriation for the bureau of statistics, agricultural and immigration for the fiscal period commencing April 1st, 1913, and ending April 1st, 1915.

*Be it enacted by the Legislature of the State of Washington:*

Appropriation $25,000.00.

SECTION 1. For the purpose of enabling the State Bureau of Statistics, Agriculture and Immigration to give sufficient publicity to the resources, advantages, and products of the State of Washington, with the view of inducing proper immigration into the state, there is hereby appropriated out of the general fund in the state treasury for the use of said bureau during the fiscal period beginning April 1st, 1913, and ending April 1st, 1915, the sum of twenty-five thousand dollars, ($25,000), said sum to include all the expenses of printing, postage, express, salary, traveling and incidentals incurred in such publicity work and in performing the regular duties of said bureau during the period named.

Passed the House March 10, 1913.
Passed the Senate March 12, 1913.
Approved by the Governor March 22, 1913.



## CHAPTER 167.

[H. B. 200.]

### ABOLISHING THE DEATH PENALTY.

AN ACT relating to the crime of murder and the punishment therefor, and amending section 2392 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

*Be it enacted by the Legislature of the State of Washington:*

[Amends Rem. Bal., § 2392; Pierce's Code, 1912, 195 § 270.]

SECTION 1. That section 2392 of Remington & Ballinger's Annotated Codes and Statutes of Washington be amended to read as follows:

Section 2392. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

Murder defined.

1. With a premeditated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or,

3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or,

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Punishment.

Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life.

Passed the House February 20, 1913.
Passed the Senate March 11, 1913.
Approved by the Governor March 22, 1913.

# APPENDIX 7

# Washington abolishes the death penalty on March 22, 1913.

On March 22, 1913, Governor Ernest Lister signed into law the abolition of the death penalty in Washington. The act was sponsored by Seattle Representative Frank P. Goss. The death penalty will be enacted again in 1919.

Between 1904, when the state began handling executions by hanging, and 1911, 15 criminals had been put to death at the State Penitentiary at Walla Walla. After women were granted the right to vote in Washington in 1911, the Legislature was swept up in a wave of reform. Bills to enact an eight-hour day for coal miners, to ban red-light districts, and to establish vocational schools were offered.

Representative Goss first offered a bill to abolish capital punishment in 1911, but it was narrowly defeated. In 1913, Goss filed the bill again. The State House of Representatives debated the issue hotly for several hours before voting to limit the penalty for first-degree murder to life imprisonment. Goss proclaimed "in a masterful speech of over one hour," (*P-I*) "I deny the abstract right of a government to take a life. I recognize only one right to kill and that is in self defense."

In 1919, a more conservative legislature reenacted the death penalty.

## Sources:

"Goss Wins Fight Against Hanging," *Seattle Post-Intelligencer,* February 21, 1913, p. 7; *Sessions Laws of Washington, 1913*; Richard Berner, *Seattle 1900-1920* (Seattle: Charles Press, 1991, pp. 173-174. By David Wilma , June 13, 2003

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# APPENDIX 8

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# THE ANNALS

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THORSTEN SELLIN, *Editor*
JAMES C. CHARLESWORTH, *Associate Editor*

## MURDER AND THE PENALTY OF DEATH

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# The Death Penalty in Washington State

By NORMAN S. HAYNER and JOHN R. CRANOR

LIKE a woman changing her mind, the sovereign state of Washington has wavered in attitude on capital punishment. The death penalty was in effect for fifty-nine years, was abolished for six, and now has been in effect again for thirty-three. Why was it abolished? Why was it restored? What is the validity of the argument for restoration in terms of later results?

The statutes enacted by the first legislature of the territory of Washington which met in Olympia in 1854 included a capital punishment law. Any person who either purposely, or in connection with a rape, arson, robbery, or burglary, killed another would upon conviction be guilty of murder in the first degree and suffer death. Such person might, however, be pardoned by the governor or have his sentence commuted to life imprisonment.[1]

It was forty-three years later before any attempt to abolish the death penalty was made. This proposal "to prohibit capital punishment in the state of Washington" passed the House by a vote of 37 to 31 with 10 absentees; it was killed in the Senate. Unsuccessful efforts were again made in 1899, 1901, and 1907. In 1911 Representative Frank P. Goss introduced in the legislature a bill to make first degree murder punishable by life imprisonment in the penitentiary instead of by death. "The House spent most of the afternoon debating the Goss bill for abolition of capital punishment, killing it finally by indefinite postponement, 53 to 40."[2] The measure was also defeated by a small majority in the Senate.

Finally, on February 20, 1913, after two hours of argument and oratory, a similar measure did pass the House by a vote of 70 to 25. During these two hours it was alleged by Mr. Goss that the existing law not only had failed to lessen crime, but was unjust and inhumane. Opponents said that abolition would increase crime and add an economic burden. Religious arguments were put forth by both sides. It was stated that convictions were hard to secure under the existing law: "Many guilty persons go free because jurors do not wish them hanged." After the long debate, "announcement of the vote was received with loud applause in which the packed galleries joined."[3]

## CAPITAL PUNISHMENT RESTORED

Attempts to revive capital punishment were made as early as 1915 and again in 1917. Fear of a crime wave following World War I was used as a reason. When in 1917 John Van Dell murdered E. W. Olson, industrial insurance commissioner, and boasted that the state could do nothing to him but board him for the rest of his life, sentiment for restoration of the death penalty flared up. This resulted in passage of a capital punishment statute by the House. The passage of this measure, which was later approved by both Senate and Governor, created one of the most exciting sessions of the 1919 legislature. The *Morning Olympian* for March 12 of that

[1] L. 1854, p. 78, sec. 12.

[2] *Olympia Daily Recorder*, Thursday Evening, January 26, 1911.

[3] *Ibid.*, February 21, 1913, p. 5, column 5. The bill was later approved by the Senate, 22 to 17, and was signed by the Governor.

TABLE 1—EXECUTIONS AND FIRST DEGREE MURDERS PER 100,000 POPULATION IN WASHINGTON STATE BY DECADES

| Decade | Estimated Population[a] at Mid-decade | Executions[b] | | First Degree Murders[b] | |
|---|---|---|---|---|---|
| | | Number | Rate | Number | Rate |
| 1. 1902–12 | 954,824 | 15 | 1.57 | 34 | 3.56 |
| 2. 1912–22 | 1,292,232 | 1 | .08 | 72 | 5.57 |
| 3. 1922–32 | 1,501,364 | 17 | 1.13 | 90 | 5.99 |
| 4. 1932–42 | 1,687,353 | 21 | 1.24 | 113 | 6.66 |
| 5. 1942–52 | 2,186,130 | 12 | .55 | 63 | 2.88 |

[a] 1907, 1917, 1927, 1937, and 1947.

[b] Data are for periods from October 1 of the first year in each decade to September 30 of the last year.

year reported the discussion as follows:

The House, by a vote of 75 to 18, passed S. B. 255 by Senators Kuykendall of Garfield, Cox of Walla Walla, and Johnson of Stevens-Pend Oreille, restoring the death penalty for first degree murder. The bill provides that in bringing in a verdict in a first degree murder case, the jury shall, if it finds the accused guilty, bring in a second verdict, deciding whether or not the murderer shall be hanged or shall serve a life sentence in the state penitentiary. Mrs. Haskell of Pierce, the only woman in the Legislature, voted for the bill. Shattuck of Kitsap moved to indefinitely postpone the bill. Shattuck's motion lost by a 78 to 15 vote. "There are too many brutal murders," declared Thompson. "We must reestablish the death penalty. We must send murderers to the gallows." Davis, Pierce, denied that murders had increased in the state since the abolition of the death penalty. He said the records in the Board of Control office showed that murders had not increased. "Do you remember two years ago when Van Dell, the murderer, went into the office of Industrial Insurance Commissioner Olson, on this very floor, and murdered him? Do you remember that Van Dell boasted that he would be sent to the pen for life to be fed and cared for?"[4] asked Reed of Mason. "Yes, I remember that and there was a lot of sentiment about it, too," replied Davis. "They used to burn witches in the olden times," said Shattuck (Sheriff of Kitsap County), closing the debate. "I tell you that I have shot at men and I have hit them. I have taken bad men to the penitentiary and have had them threaten to kill me when they got out. I don't want this Legislature to pass a law to hang the man that killed me. If he is quicker than I am and if he gets me, he is welcome. I tell you no man ever deliberately killed another unless his brain was diseased. Murderers are all crazy. Lock them up for life and take away the pardoning power of the governor. That is the right way. If you vote to pass this law, remember that next time a murderer is hanged in this state, you helped drive a nail in the scaffold. You helped to hang him."

[4] John Van Dell, WSP 8286, was sentenced to life imprisonment for murder in the first degree on March 17, 1917. Since he died June 23, 1921 of natural causes, the state did not have an exorbitant board bill in his case.

## WHAT ARE THE FACTS?

Now, after thirty-three more years of experience with capital punishment, what can we say about the validity of these arguments? What has been the trend of executions during the past fifty years? Does this seem to have any relation to the rate for first degree murders? Do all counties use the death penalty? What is the warden's attitude toward executions?

Table 1 shows the number of executions per 100,000 population by decades and the number of first degree murders

which resulted in commitment to the penitentiary.

It will be noted that the relation of executions to population remained fairly constant except for the period when the death penalty was abolished and during the last decade, when hangings dropped sharply. Although the murder rate increased during the second ten-year period when there was only one execution, it remained high in the third and fourth decades when hangings were frequent, and decreased with the execution rate in the fifth. These data suggest, but do not prove, (1) that executions have no clear-cut deterrent effect on murders

TABLE 2—COMMITMENTS FOR CAPITAL CRIMES FOR THREE SUCCESSIVE SIX-YEAR PERIODS BEGINNING MARCH 1907

| Period | Total Commitments | Capital Crime Commitments | |
|---|---|---|---|
| | | Number | Percentage |
| 1907–13 | 2,397 | 16[a] | .7 |
| 1913–19 | 1,904 | 37 | 1.9 |
| 1919–25 | 2,001 | 35[b] | 1.7 |

[a] Seven executions.
[b] Five executions.

and (2) that the incidence of both executions and murders is a product of other, more basic factors.[5]

Executions became a function of the state penitentiary in 1904. Prior to May 6, 1904, when the first person was hanged at the Walla Walla prison, the counties had performed that duty. Since then there have been sixty-six of them. Twenty of the thirty-nine counties in the state have never sent an individual to Walla Walla for execution. Six counties have sent one; six counties, two or three; five counties, four or five; one county, nine; and one, fourteen. This means that, while the penalty is available to all courts, thirty-two counties are either not using it at all or using it to a limited extent.

The death penalty was repealed March 22, 1913 and restored March 14, 1919. Records available at the prison indicate that there was an increase in the number of capital crimes committed during that period. The higher rate continued, however, after capital punishment was restored.

One of the authors is a penologist who has spent more than twenty years in penal and correctional administration. His first experience with capital punishment occurred three years ago when he came to the Washington State Penitentiary. Two adjacent counties had suffered from almost identical murders. Because of a sharp difference in penal philosophy, the murderer who had many undesirable characteristics was given life, while the other, a fine-appearing fellow who seemed to have much more promise for rehabilitation,[6] had to be hanged. To those who are responsible for the execution of the death penalty, it is no pleasant task. We have never talked with a prison warden enjoined with this duty who was favorable to the death penalty. The late Warden Lewis E. Lawes, perhaps responsible for more executions than any other official in our country, concluded: "My experience has convinced me of the futility of capital punishment." [7] To such wardens an execution seems even less hu-

[5] First degree murders do not, of course, include the many instances where the charge accusing a person of first degree murder has been amended to read second degree murder on condition that the defendant plead guilty. It would be interesting to know whether such arrangements have increased or decreased in frequency during the past decade.

[6] A 1948 study of the 89 first degree murderers released from the territorial and later the state prison between 1882 and 1947 showed that only six were known to have gotten into trouble again.

[7] *Twenty Thousand Years in Sing Sing* (New York, 1932), p. 1.

mane to the man's family than to the convicted person himself.

Although any group that has changed its mind twice could conceivably do so once more, it is probable that the people of Washington State will retain the death penalty. An occasional special case, like that of Van Dell, will tend to prevent abolition of capital punishment again.

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*John R. Cranor, Walla Walla, Washington, is warden of the Washington State Penitentiary. Prior to 1930 he served in the public schools of Michigan, Indiana, and Illinois. His career in penal and correctional administration has included positions in Illinois, Pennsylvania, Connecticut, New York, and Rhode Island, in addition to Washington. During 1947–49 he was Civilian Prison Administrator with General Douglas MacArthur in Japan.*

# APPENDIX 9

State Road No. 10; Section 5901-j, Rem. & Bal. Code, establishing State Road No. 19; Section 5903, Rem. & Bal. Code, establishing State Roads Nos. 14, 15, 16 and 17, and that paragraph of Section 5905, Rem. & Bal. Code establishing State Road No. 7 and extensions, be and the same are hereby repealed.

Emergency.

SEC. 10. This act is necessary for the immediate support of the state government and its existing public institutions and shall take effect immediately.

Passed the House March 6, 1919.
Passed the Senate March 11, 1919.
Approved by the Governor March 14, 1919.

## CHAPTER 111.

[S. B. No. 113.]

### EMPLOYMENT OF ALIENS IN PUBLIC OFFICE OR ON PUBLIC WORKS.

AN ACT prohibiting the employment of certain aliens by public officials and on public works and providing penalties for violations thereof.

*Be it enacted by the Legislature of the State of Washington:*

Employment prohibited.

SECTION 1. It shall be unlawful for any officer or agent of, or any contractor with, the State of Washington, or any county, city, town or municipal corporation to knowingly employ any alien, whether a declarant or otherwise, who claimed and was granted exemption from military service in the war with Germany and her allies, under the provisions of the "Act of Congress, May 18, 1917," or any acts amendatory thereof, on the ground that he was not a citizen of the United States.



Acceptance of employment prohibited.

SEC. 2. It shall be unlawful for any such alien to accept employment with any officer or agent of, or any contractor for, the State of Washington, or any county, city, town or municipal corporation thereof.

Lists of employees.

SEC. 3. Every contractor shall, upon demand of the executive officer of the state or municipal corporation with which he has contracted, furnish a list of his employes which shall set forth whether they are citizens of the United States.

Penalty.

SEC. 4. Every person violating the provisions of this act shall be guilty of a misdemeanor.

Passed the Senate February 13, 1919.
Passed the House March 11, 1919.
Approved by the Governor March 13, 1919.

## CHAPTER 112.

[S. B. No. 256.]

### CRIME AND PUNISHMENT OF MURDER IN THE FIRST DEGREE.

AN ACT relating to the crime of murder and the punishment therefor, and amending section 2392 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. That section 2392 of Remington & Ballinger's Annotated Codes and Statutes of Washington be amended to read as follows:

Crime defined.

Section 2392. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

1. With a premeditated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human

life, without a premeditated design to effect the death of any individual; or,

3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery, rape, burglary, larceny or arson in the first degree; or,

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Death penalty.

Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death; and in every trial for murder in the first degree, the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the death penalty shall be inflicted; and if such special verdict is in the affirmative, the penalty shall be death, otherwise, it shall be as herein provided. All executions in accordance herewith shall take place at the State Penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof.

Passed the Senate March 7, 1919.
Passed the House March 11, 1919.
Approved by the Governor March 14, 1919.



## CHAPTER 113.

[S. B. No. 170.]

### AMENDING ACT FOR GOVERNMENT OF CITIES OF THIRD CLASS.

AN ACT relating to the government of cities of the third class, providing for the appointment of officers and for procedure in police courts, and amending sections 6 and 29 of chapter 184 of the Session Laws of 1915.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. That section 6 of chapter 184 of the Session Laws of 1915, be amended to read as follows:

Vacancies, how filled.

Section 6. Any vacancy occurring in any of the offices provided for in this chapter shall be filled by appointment by the mayor, but if such office be elective, such appointee shall hold office only until the next regular election, at which time a person shall be elected to serve for the remainder of such unexpired term. In case a member of the city council shall absent himself for three consecutive regular meetings thereof, unless by permission of the city council, his office may be declared vacant by the city council, and any vacancies in the city council or in the office of mayor shall be filled by a majority vote of such city council. A temporary vacancy in any of the appointive offices provided for in this chapter caused by the illness, absence from the city or other temporary inability to act of the incumbent, may be filled by appointment by the mayor; such appointee to exercise the duties of the office until the said temporary disability is removed.

Temporary vacancies.

SEC. 2. That section 29 of chapter 184 of the Session Laws of 1915 be amended to read as follows:

Police judge.

Section 29. At the time he shall make his other appointments, the mayor shall appoint a police

# APPENDIX 10

**10.70.90 Death penalty — How executed.**

[Code 1881 § 1131; 1873 p 244 § 289; 1854 p 125 § 153; RRS § 2212.]

Repealed by 1981 c 138 § 24.

# APPENDIX 11

(14) To set forth for the perusal of counties, city–counties, cities and towns, model ordinances by which any legislative authority thereof may enter into the taxing of any gambling activity authorized in RCW 9.46.030 as now or hereafter amended;

(15) To publish and make available at the office of the commission or elsewhere to anyone requesting it a list of the commission licensees, including the name, address, type of license, and license number of each licensee; and

(16) To perform all other matters and things necessary to carry out the purposes and provisions of this chapter.

Passed the Senate June 9, 1975.
Passed the House June 9, 1975.
Approved by the Governor June 27, 1975.
Filed in Office of Secretary of State June 27, 1975.

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## CHAPTER 260

[Engrossed Substitute Senate Bill No. 2092]
WASHINGTON CRIMINAL CODE

AN ACT Relating to crimes and criminal procedure; adding a new title to the Revised Code of Washington to be designated as Title 9A; repealing section 51, chapter 249, Laws of 1909 and RCW 9.01.010; repealing section 11, page 78, Laws of 1854, section 11, page 106, Laws of 1859, section 11, page 200, Laws of 1869, section 11, page 200, Laws of 1873, section 781, Code of 1881, section 1, chapter 249, Laws of 1909 and RCW 9.01.020; repealing section 125, page 98, Laws of 1854, section 124, page 129, Laws of 1859, section 134, page 229, Laws of 1869, section 140, page 213, Laws of 1873, section 957, Code of 1881, section 8, chapter 249, Laws of 1909 and RCW 9.01.030; repealing section 2, chapter 249, Laws of 1909 and RCW 9.01.040; repealing section 2, chapter 249, Laws of 1909 and RCW 9.01.050; repealing section 127, page 98, Laws of 1854, section 136, page 229, Laws of 1869, section 142, page 213, Laws of 1873, section 956, Code of 1881, section 10, chapter 249, Laws of 1909 and RCW 9.01.060; repealing section 30, page 185, Laws of 1873, section 1161, Code of 1881, section 12, chapter 249, Laws of 1909 and RCW 9.01.070; repealing section 1, chapter 233, Laws of 1927 and RCW 9.01.080; repealing section 784, Code of 1881, section 17, chapter 249, Laws of 1909 and RCW 9.01.090; repealing section 18, chapter 249, Laws of 1909 and RCW 9.01.100; repealing section 5, chapter 249, Laws of 1909 and RCW 9.01-.111; repealing section 4, chapter 249, Laws of 1909 and RCW 9.01.112; repealing section 3, chapter 249, Laws of 1909 and RCW 9.01.113; repealing section 6, chapter 249, Laws of 1909 and RCW 9.01.114; repealing section 2, chapter 76, Laws of 1967 and RCW 9.01.116; repealing section 1, Code of 1881, section 47, chapter 249, Laws of 1909 and RCW 9.01.150; repealing section 46, chapter 249, Laws of 1909 and RCW 9.01.170; repealing section 48, chapter 249, Laws of 1909 and RCW 9.01.180; repealing section 49, chapter 249, Laws of 1909 and RCW 9.01.190; repealing section 376, chapter 249, Laws of 1909 and RCW 9.08.040; repealing section 40, page 82, Laws of 1854, section 44, page 189, Laws of 1873, section 823, Code of 1881, section 40, page 77, Laws of 1886, section 1, chapter 87, Laws of 1895, section 320, chapter 249, Laws of 1909, section 1, chapter 11, Laws of 1863 and RCW 9.09.010; repealing section 40, page 82, Laws of 1854, section 44, page 189, Laws of 1873, section 823, Code of 1881, section 40, page 77, Laws of 1886, section 1, chapter 87, Laws of 1895, section 321, chapter 249, Laws of 1909, section 1, chapter 265, Laws of 1927, section 2, chapter 11, Laws of 1963, section 1, chapter 17, Laws of 1965 ex. sess. and RCW 9.09.020; repealing section 322, chapter 249, Laws of 1909 and RCW 9.09.030; repealing section 323, chapter 249, Laws of 1909 and RCW 9.09.040; repealing section 324, chapter 249, Laws of 1909 and RCW 9.09.050; repealing section 6, chapter 87, Laws of 1895, section 325, chapter 249, Laws of 1909 and RCW 9.09.060; repealing section 24, page 79, Laws of 1854, section 28, page 80, Laws of 1854, sections 24 through 30, page 202, Laws of 1869, sections 29 through 34, page 185, Laws of 1873, sections 801 through 809, Code of 1881, section 161, chapter 249, Laws of 1909 and RCW 9.11.010; repealing section 24, page 79, Laws of 1854, section 28, page 80, Laws of 1854, sections 24 through 30, page 202, Laws of 1869, sections 29 through 34, page 185, Laws of 1873, sections 801 through 809, Code of 1881, section 162, chapter 249, Laws of 1909 and RCW 9.11.020; repealing section 24, page 79, Laws of 1854, section 28, page 80, Laws of 1854, sections 24 through 30, page 202, Laws of 1869, sections 29 through 34, page 185, Laws of

## CHAPTER 9A.20
## CLASSIFICATION OF CRIMES

NEW SECTION. Sec. 9A.20.010. CLASSIFICATION AND DESIGNATION OF CRIMES. (1) Classified Felonies. (a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:

(i) Class A felony; or

(ii) Class B felony; or

(iii) Class C felony.

(2) Misdemeanors and Gross Misdemeanors. (a) Any crime punishable by a fine of not more than five hundred dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.

NEW SECTION. Sec. 9A.20.020. AUTHORIZED SENTENCES OF OFFENDERS. (1) Felony. Every person convicted of a classified felony shall be punished as follows:

(a) For a Class A felony, by imprisonment in a state correctional institution for a maximum term fixed by the court of not less than twenty years or by a fine of not more than ten thousand dollars or by both such imprisonment and fine;

(b) For a Class B felony, by imprisonment in a state correctional institution for a maximum term fixed by the court of not more than ten years or by a fine of not more than ten thousand dollars or by both such imprisonment and fine;

(c) For a Class C felony, by imprisonment in a state correctional institution for a maximum term fixed by the court of not more than five years or by a fine of not more than five thousand dollars or by both such imprisonment and fine.

(2) Gross Misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year or by a fine of not more than one thousand dollars or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days or by a fine of not more than five hundred dollars or by both such imprisonment and fine.

NEW SECTION. Sec. 9A.20.030. ALTERNATIVE TO A FINE. (1) If a person has gained money or property or caused a victim to lose money or property through the commission of a crime, upon conviction thereof the court, in lieu of imposing the fine authorized for the offense under section 9A.20.020, may order the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain or victim's loss from the commission of a crime. Such amount may be used to provide restitution to the victim at the order of the court. In such case the court shall make a finding as to the amount of the defendant's gain or victim's loss from the crime, and if the record does not contain

NEW SECTION. Sec. 9A.32.030. MURDER IN THE FIRST DEGREE. (1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He commits or attempts to commit the crime of either (1) robbery, in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first degree, or (5) kidnaping, in the first or second degree, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a Class A felony.

NEW SECTION. Sec. 9A.32.040. MURDER IN THE FIRST DEGREE - SENTENCE. Notwithstanding section 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced to life imprisonment.

NEW SECTION. Sec. 9A.32.050. MURDER IN THE SECOND DEGREE. (1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or

(b) He commits or attempts to commit any felony other than those enumerated in section 9A.32.030(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

NEW SECTION. Sec. 9A.88.090. PERMITTING PROSTITUTION. (1) A person is guilty of permitting prostitution if, having possession or control of premises which he knows are being used for prostitution purposes, he fails without lawful excuse to make reasonable effort to halt or abate such use.

(2) Permitting prostitution is a misdemeanor.

NEW SECTION. Sec. 9A.88.100. INDECENT LIBERTIES. (1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another:

(a) By forcible compulsion; or

(b) When the other person is less than fourteen years of age; or

(c) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

(2) For purposes of this section, "sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.

(3) Indecent liberties is a Class B felony.

## CHAPTER 9A.92
## LAWS REPEALED

NEW SECTION. Sec. 9A.92.010. ACTS OR PARTS OF ACTS REPEALED. The following acts or parts of acts are each hereby repealed:

(1) Section 51, chapter 249, Laws of 1909 and RCW 9.01.010;

(2) Section 11, page 78, Laws of 1854, section 11, page 106, Laws of 1859, section 11, page 200, Laws of 1869, section 11, page 200, Laws of 1873, section 781, Code of 1881, section 1, chapter 249, Laws of 1909 and RCW 9.01.020;

(3) Section 125, page 98, Laws of 1854, section 124, page 129, Laws of 1859, section 134, page 229, Laws of 1869, section 140, page 213, Laws of 1873, section 957, Code of 1881, section 8, chapter 249, Laws of 1909 and RCW 9.01.030;

(4) Section 2, chapter 249, Laws of 1909 and RCW 9.01.040;

(5) Section 2, chapter 249, Laws of 1909 and RCW 9.01.050;

(6) Section 127, page 98, Laws of 1854, section 136, page 229, Laws of 1869, section 142, page 213, Laws of 1873, section 956, Code of 1881, section 10, chapter 249, Laws of 1909 and RCW 9.01.060;

(7) Section 30, page 185, Laws of 1873, section 1161, Code of 1881, section 12, chapter 249, Laws of 1909 and RCW 9.01.070;

(8) Section 1, chapter 233, Laws of 1927 and RCW 9.01.080;

(9) Section 784, Code of 1881, section 17, chapter 249, Laws of 1909 and RCW 9.01.090;

(10) Section 18, chapter 249, Laws of 1909 and RCW 9.01.100;

(11) Section 5, chapter 249, Laws of 1909 and RCW 9.01.111;

(12) Section 4, chapter 249, Laws of 1909 and RCW 9.01.112;

(13) Section 3, chapter 249, Laws of 1909 and RCW 9.01.113;

(14) Section 6, chapter 249, Laws of 1909 and RCW 9.01.114;

(15) Section 2, chapter 76, Laws of 1967 and RCW 9.01.116;

(16) Section 1, Code of 1881, section 47, chapter 249, Laws of 1909 and RCW 9.01.150;

(17) Section 46, chapter 249, Laws of 1909 and RCW 9.01.170;

(94) Section 108, page 95, Laws of 1854, section 119, page 208, Laws of 1873, section 923, Code of 1881 and RCW 9.33.070;
(95) Section 363, chapter 249, Laws of 1909 and RCW 9.34.010;
(96) Section 364, chapter 249, Laws of 1909 and RCW 9.34.020;
(97) Section 365, chapter 249, Laws of 1909 and RCW 9.37.010;
(98) Section 367, chapter 249, Laws of 1909 and RCW 9.37.020;
(99) Section 421, chapter 249, Laws of 1909 and RCW 9.37.030;
(100) Section 422, chapter 249, Laws of 1909 and RCW 9.37.040;
(101) Section 1, chapter 46, Laws of 1911 and RCW 9.37.050;
(102) Section 1, chapter 78, Laws of 1937 and RCW 9.37.060;
(103) Section 370, chapter 249, Laws of 1909 and RCW 9.38.030;
(104) Section 409, chapter 249, Laws of 1909 and RCW 9.38.050;
(105) Section 267, chapter 249, Laws of 1909 and RCW 9.40.010;
(106) Section 268, chapter 249, Laws of 1909 and RCW 9.40.020;
(107) Section 269, chapter 249, Laws of 1909 and RCW 9.40.030;
(108) Section 847, Code of 1881, section 9, page 127, Laws of 1890 and RCW 9.40.050;
(109) Section 2, page 300, Laws of 1877, section 1225, Code of 1881, section 13, chapter 69, Laws of 1891 and RCW 9.40.060;
(110) Section 1, page 300, Laws of 1877, section 1224, Code of 1881, section 14, chapter 69, Laws of 1891 and RCW 9.40.070;
(111) Section 4, page 300, Laws of 1877, section 1227, Code of 1881, section 15, chapter 69, Laws of 1891 and RCW 9.40.080;
(112) Section 338, chapter 249, Laws of 1909 and RCW 9.44.010;
(113) Section 57, page 85, Laws of 1854, section 63, page 194, Laws of 1873, section 854, Code of 1881, section 331, chapter 249, Laws of 1909 and RCW 9.44.020;
(114) Section 332, chapter 249, Laws of 1909 and RCW 9.44.030;
(115) Section 57, page 85, Laws of 1854, section 63, page 194, Laws of 1873, section 854, Code of 1881, section 333, chapter 249, Laws of 1909 and RCW 9.44.040;
(116) Section 334, chapter 249, Laws of 1909 and RCW 9.44.050;
(117) Section 57, page 85, Laws of 1854, section 63, page 194, Laws of 1873, section 854, Code of 1881, section 335, chapter 249, Laws of 1909 and RCW 9.44.060;
(118) Section 336, chapter 249, Laws of 1909 and RCW 9.44.070;
(119) Section 122, chapter 249, Laws of 1909 and RCW 9.45.010;
(120) Section 219, chapter 249, Laws of 1909 and RCW 9.45.030;
(121) Section 375, chapter 249, Laws of 1909 and RCW 9.45.050;
(122) Section 1, page 99, Laws of 1890 and RCW 9.45.200;
(123) Section 138, chapter 249, Laws of 1909, section 1, chapter 49, Laws of 1970 ex. sess. and RCW 9.48.010;
(124) Section 139, chapter 249, Laws of 1909 and RCW 9.48.020;
(125) Section 12, page 78, Laws of 1854, section 12, page 200, Laws of 1869, section 12, page 182, Laws of 1873, section 786, Code of 1881, section 1, chapter 69, Laws of 1891, section 140, chapter 249, Laws of 1909 and RCW 9.48.030;

# APPENDIX 12

There is hereby appropriated from the state general fund including amounts from motor vehicle excise taxes imposed pursuant to RCW 35.58.273 through 35-.58.279 except those amounts which are obligated for bonds and the covenants thereof issued as of the effective date of this 1975 amendatory act to the superintendent of public instruction for the biennium ending June 30, 1977, for distribution appropriate to the purposes of this section during the 1975–76 school year to school districts as hereinafter in this section provided, the sum of sixty-five million dollars or so much thereof as may be necessary: PROVIDED, That not more than three and one-half million dollars of such amount shall be allocated to districts which have submitted but failed to authorize one or more excess levies for maintenance and operations in 1976 and with a relatively high percentage of urban, rural, racial, and disadvantaged children, to continue quality educational programs for the 1975–76 school year at approximately the same student-teacher ratio that existed during the 1974–75 school year for any such districts or schools within such districts.

Allocations under this section for special levy relief shall be made by the superintendent of public instruction to local school districts in accordance with the following procedure:

Those local school districts which have received authorization for collection of an excess levy in 1976 for maintenance and operations or which have submitted one or more excess levies for maintenance and operations in 1976 shall receive an amount in the sum of eighty dollars, or as much as may be available thereof, per full time equivalent pupil enrolled for the 1975–76 school year. The superintendent of public instruction shall determine and notify each local school district of the amount of such funds made available by this section. Each board of directors of a local school district which qualifies for an allotment of funds for special levy relief pursuant to the provisions of this section and has been authorized an excess levy for maintenance and operations for collection in 1976, prior to receiving an allotment of funds hereunder, shall certify to the respective county legislative authority a reduction in the excess levy equal to the amount of funds made available for special levy relief pursuant to this section: PROVIDED, That school districts which submitted multiple special levy propositions at any one election for maintenance and operations collectible in 1976 and which received voter approval to levy at least one of such propositions, and at no other election received voter approval for levy propositions for maintenance and operations collectible in 1976, need certify to their respective county legislative authority a reduction in such excess levy only in an amount thereof equal to the percentage that the levy proposition receiving voter approval bears to the total of such multiple special levy propositions presented to the people at such election. Any school district which fails to certify and roll back excess levies in the manner required by this section shall not receive any allotment from the superintendent of public instruction of the funds made available under this section. Notwithstanding any other provision of this section, any district receiving authorization for collection of an excess levy in 1976 for maintenance and operations shall not receive an allocation during the last half of fiscal year 1976 in an amount together with the reduced levy collection over the amount which would have been derived from the originally approved levy for such period. Any excess amount of the allocation due any such district as





calculated pursuant to this section shall be distributed as the superintendent of public instruction shall direct during the first six months of fiscal year 1977.

Those local school districts which did not submit one or more excess levies for maintenance and operations for collection in 1976 and in addition experience a net per pupil expenditure, excluding transportation costs, of less than the statewide average per student during the 1974–75 school year, shall receive an amount equal to fifty dollars per full time equivalent pupil during the 1975–76 school year.

The superintendent of public instruction, pursuant to chapter 34.04 RCW, shall promulgate rules and regulations to effect the intent of this section.

NEW SECTION. Sec. 2. This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House September 6, 1975.
Passed the Senate September 6, 1975.
Approved by the Governor September 9, 1975.
Filed in Office of Secretary of State September 9, 1975.

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## CHAPTER 8

[House Bill No. 1243]

### APPROPRIATION——STATE'S LIABILITY, VALENTINE V. JOHNSTON JUDGMENT

AN ACT Relating to appropriations; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. There is hereby appropriated to the department of revenue from the general fund the sum of nine hundred and fifty thousand dollars: PROVIDED, That this appropriation or so much thereof as may be necessary, shall be for the purpose of satisfying the state's liability in accordance with the judgment of the Pierce county superior court entered August 8, 1975, in the case of Valentine v. Johnston (Cause No. 197735).

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House September 6, 1975.
Passed the Senate September 6, 1975.
Approved by the Governor September 9, 1975.
Filed in Office of Secretary of State September 9, 1975.

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## CHAPTER 9

[Initiative Measure No. 316]

### DEATH PENALTY——AGGRAVATED MURDER

AN ACT Relating to crimes and punishments; adding new sections to chapter 9A.32 RCW; defining crimes; and prescribing penalties.

Be it enacted by the people of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 9A.32 RCW a new section to read as follows:

AGGRAVATED MURDER IN THE FIRST DEGREE. A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of the following circumstances:

(1) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing.

(2) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution.

(3) The defendant committed the murder pursuant to an agreement that he receive money or other thing of value for committing the murder.

(4) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror.

(6) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(7) The defendant committed the murder in the course of or in furtherance of the crime of rape or kidnapping or in immediate flight therefrom.

NEW SECTION. Sec. 2. There is added to chapter 9A.32 RCW a new section to read as follows:

AGGRAVATED MURDER IN THE FIRST DEGREE——PENALTY. A person found guilty of aggravated murder in the first degree as defined in section 1 of this act, shall be punished by the mandatory sentence of death. Once a person is found guilty of aggravated murder in the first degree, as defined in section 1 of this act, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the sentence of death. Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: PROVIDED, That the time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof.

NEW SECTION. Sec. 3. There is added to chapter 9A.32 RCW a new section to read as follows:

AGGRAVATED MURDER IN THE FIRST DEGREE——LIFE IMPRISONMENT. In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington in any of the circumstances specified in section 1 of this act, the penalty for aggravated murder in the first degree in those circumstances shall be imprisonment in the state penitentiary for life. A person sentenced to life imprisonment under this section shall not





have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner or reduce the period of confinement nor release the convicted person as a result of any automatic good time calculation nor shall the department of social and health services permit the convicted person to participate in any work release or furlough program.

NEW SECTION. Sec. 4. There is added to chapter 9A.32 RCW a new section to read as follows:

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

NEW SECTION. Sec. 5. The section captions as used in this act are for organizational purposes only and shall not be construed as part of the law.

Filed in Office of Secretary of State May 27, 1975.

Passed by the vote of the people at the November 4, 1975 state general election.

Proclamation signed by the Governor, December 4, 1975.

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## CHAPTER 10

[House Bill No. 1166]

### PROPERTY TAX COLLECTION——DATES

AN ACT Relating to revenue and taxation; amending section 84.56.010, chapter 15, Laws of 1961 as amended by section 2, chapter 7, Laws of 1965 ex. sess. and RCW 84.56.010; amending section 84.56.070, chapter 15, Laws of 1961 and RCW 84.56.070; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 84.56.010, chapter 15, Laws of 1961 as amended by section 2, chapter 7, Laws of 1965 ex. sess. and RCW 84.56.010 are each amended to read as follows:

On or before the first Monday in January next succeeding the date of levy of taxes the county auditor shall issue to the county treasurer his warrant authorizing the collection of taxes listed on the tax rolls of his county as certified by the county assessor for such assessment year, and said rolls shall be preserved as a public record in the office of the county treasurer. The amount of said taxes levied and extended upon said rolls shall be charged to the treasurer in an account to be designated as treasurer's "Tax roll account" for ..... and said rolls with the warrants for collection shall be full and sufficient authority for the county treasurer to receive and collect all taxes therein levied: PROVIDED, That the county treasurer shall in no case collect such taxes or issue receipts for the same or enter payment or satisfaction of such taxes upon said assessment rolls before the ((~~fifteenth~~)) first day of ((~~February~~)) March following.

Sec. 2. Section 84.56.070, chapter 15, Laws of 1961 and RCW 84.56.070 are each amended to read as follows:

On the ((~~fifteenth~~)) first day of ((~~February~~)) March succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He

# APPENDIX 13

OFFICE OF THE ATTORNEY GENERAL
SLADE GORTON ATTORNEY GENERAL
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98504

OLYMPIA--August 6, 1976--A new law giving the sentencing authority limited discretion to impose the death penalty would meet constitutional standards as recently set forth by the United States Supreme Court, according to Attorney General Slade Gorton.

In a formal legal opinion issued today, Gorton noted that the Court recently upheld certain types of death penalty laws but struck down those in two states which made capital punishment mandatory upon conviction of certain serious crimes.

The problem with such laws, according to the Court, is that they are arbitrary in that they require execution upon conviction regardless of such arguably relevant factors as past criminal record or likelihood of future misconduct.

Because the Washington statute is of that type, it now is "constitutionally unenforceable," although it remains on the books.

Washington can have a constitutional law, Gorton held, but it should provide for sentencing separate from the trial and it should specify what relevant information should be considered in the process.

He noted that at least two states, Georgia and Florida, require a higher court automatically to review any death penalty to insure that the earlier proceedings were properly conducted and that the penalty is consistent with other sentences imposed in other trials under similar circumstances.

-MORE-

The final points of Gorton's opinion involve a constitutional provision protecting a law passed by the initiative process, such as the existing capital punishment statute, for two years after it is adopted by the people.

Repeal or amendment of such measures can be accomplished only by a two-thirds vote of both houses of the legislature or by a vote of the people themselves in a general or special election.

Gorton also indicated that the legislature could enact an entirely new capital punishment statute so long as it did not attempt to amend or repeal the present law, which in that event simply would be rendered obsolete.

The opinion was requested by State Representative Earl F. Tilly, 12th District.

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OFFICE OF THE ATTORNEY GENERAL
SLADE GORTON ATTORNEY GENERAL
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98504

CRIMES--CAPITAL PUNISHMENT--CONSTITUTIONALITY OF DEATH PENALTY--INITIATIVE AND REFERENDUM--ENACTMENT OF NEW DEATH PENALTY LAW.

(1) Recent decisions by the United States Supreme Court holding mandatory death penalty laws to be unconstitutional have rendered RCW 9A.32.046, enacted pursuant to Initiative No. 316, constitutionally unenforceable; however, in line with other supreme court decisions involving death penalty laws a constitutionally valid death penalty statute may still be enacted in accordance with guidelines set forth in those decisions.

(2) Because RCW 9A.32.046 was enacted as a part of Initiative No. 316 at the 1975 state general election, that statute may not be repealed by the legislature for a period of two years following its enactment and it may only be amended during such period by a two-thirds majority vote of the members of both houses of the legislature; however, this existing state death penalty statute may be amended or repealed at any time pursuant to an initiative or referendum measure approved by the voters.

(3) It is possible that legislation establishing a new, constitutionally valid, death penalty for the state of Washington could be enacted by the legislature by a simple majority vote, even during the immediate two-year period following the passage of Initiative No. 316, if the new law is not drafted as either an amendment or repeal of RCW 9A.32.046.

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August 5, 1976

Honorable Earl F. Tilly
State Representative, 12th District
1509 Jefferson
Wenatchee, Washington 98801

Cite as:
AGO 1976 No. 15

Dear Sir:

In a line of decisions handed down on July 2, 1976, the United States Supreme Court upheld the constitutionality

of statutes providing for imposition of the death penalty for the crime of murder (and in the case of Georgia, certain other crimes) as enacted by the legislatures of the states of Georgia, Florida and Texas. See, Gregg v. Georgia, ___ U.S.___, 44 L.W. 5230; Proffitt v. Florida, __ U.S.___, 44 L.W. 5256; and Jurek v. Texas, __U.S.___, 44 L.W. 5262. At the same time, however, the Supreme Court invalidated, as a form of "cruel and unusual punishment" prohibited by the Eighth Amendment to the U.S. Constitution, other death penalty laws which had been enacted in the states of North Carolina and Louisiana. Woodson v. North Carolina, __U.S.__, 44 L.W. 5267; and Roberts v. Louisiana, __U.S.__, 44 L.W. 5281. As the prime sponsor of the Washington death penalty law, chapter 9, Laws of 1975-76, 2nd Ex. Sess. (Initiative No. 316), you have, therefore, requested our opinion regarding the impact of these decisions upon our own law and, in addition, you have posed several questions pertaining to the procedures to be followed in amending our law if it is deemed by us no longer to be constitutionally enforceable.

We will set forth your specific questions, and our answers thereto, within the body of this opinion.

## ANALYSIS

### I.

Introduction:

Capital punishment, or the death penalty, has in recent years become the subject of considerable activity both within the halls of state legislatures and in the courts. Although earlier attempts to have this form of criminal punishment declared unconstitutional by the courts had failed, a sharply divided United States Supreme Court, some four years ago in Furman v. Georgia, 408 U.S. 238, 33 L. ed. 2d 346, 92 S.Ct. 2726 (1972), struck down a Georgia death penalty law on the ground that this law was in violation of the prohibition against "cruel and unusual punishment" contained in the Eighth Amendment to the U.S. Constitution. Thereafter, state lawmakers throughout the nation reacted by changing the death penalty statutes of their respective states in order, if possible, to remove the features of those statutes to which the Supreme Court had apparently objected in the Furman case. This course of legislative response to the Court's ruling, in turn, culminated in the five cases decided on July 2, 1976,

to which you have referred in your request. The basic question here presented concerns the impact of those cases upon the particular response to the Furman ruling which was made by the voters of our own state through their passage of Initiative No. 316 at the November, 1975, state general election.

Under the Georgia statute which was struck down in the Furman case, the jury involved in a murder or other criminal trial in which the death penalty could be imposed was vested with unrestricted discretionary authority whereby it was permitted to determine in each case, in accordance with whatever criteria might seem significant to the particular jury, whether or not the defendant (upon being convicted) should be sentenced to death or, instead, to a term of imprisonment. Two members of the Supreme Court, Justices Brennan and Marshall, expressed the view that this statute was unconstitutional under the Eighth Amendment, supra, because the death penalty, no matter how or for what crime it is imposed, constitutes cruel and unusual punishment in violation of that portion of the federal Bill of Rights. Three other members of the court, Justices Douglas, Stewart and White, wrote opinions in which, instead, they merely held the procedural aspects of the Georgia law to be unconstitutional because, basically, of the unquestionably irrelevant factors which a jury was allowed to take into consideration in rendering its decision as to whether a given criminal defendant should live or die. This constituted "cruel and unusual" punishment, in the minds of these three justices, because of the arbitrary or happenstance results which could flow from the statutory system involved. As was succinctly explained in the concurring opinion of Justice Stewart, 408 U.S. 309-10:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . ."

Notwithstanding this objection to the Georgia law, however, the four remaining members of the 1972 Supreme Court which ruled in the Furman case - Chief Justice Burger and Justices Blackmun, Powell and Rehnquist - voted to sustain the death

penalty even when imposed in the manner then provided for by that law. In essence the position of those four dissenters was that the Eighth Amendment is not violated by such a law because that constitutional provision in no way speaks ". . . to the power of legislatures to confer sentencing discretion on juries. . ." (408 U.S. 238.)

Since, however, a majority of the Supreme Court thought otherwise, the result of the Furman case was that at least the "unlimited discretion" approach which was a part of the then existing Georgia death penalty statute - as well as those of most other states as they then existed - became constitutionally unenforceable. In our own state this was expressly held to be so by the Washington supreme court, with respect to the death penalty provisions of RCW 9.48.030, in September of 1972, in the case of State v. Baker, 81 Wn. 2d 281, 501 P. 2d 284 (1972). But because only two members of the Furman majority looked upon the death penalty as being unconstitutional per se, two other possible routes to a constitutionally defensible death penalty law appeared still to be available. One such route, seemingly, was that of totally eliminating any discretionary function in the court or jury and, instead, substituting an automatic, mandatory, death penalty for certain specified degrees of murder or other crimes which had traditionally been characterized as capital offenses. Conversely, the other possible route to a constitutionally valid death penalty law was to retain the basic concept of a discretionary penalty while attempting to remove the constitutional infirmities of unrestricted discretion by establishing mandatory standards and criteria to be applied by the court or jury in each case - standards and criteria which would be relevant to the issue of life or death for those convicted of the serious crimes for which the death penalty might be imposed.

Among the states which chose to take the latter approach were Georgia itself, along with Florida and Texas. On the other hand the states which responded to the Furman decision by enacting mandatory death penalty statutes included North Carolina and Louisiana - and, as we will see in a moment, the state of Washington. Conceivably, in view of the diversity of opinions expressed by the different justices in the Furman case, either or both of these responses could have been expected to pass constitutional muster when tested;

and in fact, as things turned out, both types of death penalty laws were found to be valid by three of the four members of the Court who had dissented in Furman. Those three were Chief Justice Burger and Justices Blackmun and Rehnquist - joined by Justice White who had been among the justices ruling against the "unlimited discretion" approach which the majority had held to be unconstitutional in that case. The remaining five members of the Court,[1] however, ultimately drew a distinction between (1) the mandatory imposition of a death penalty in all capital cases and (2) the "guided discretion" system represented by the new Georgia laws and those of Florida and Texas. Thus, while the latter were upheld by a seven to two majority of the Supreme Court in Gregg v. Georgia, Proffitt v. Florida and Jurek v. Texas, supra, the former was held to be unconstitutional by a five to four majority in Woodson v. North Carolina and Roberts v. Louisiana, supra.[2]

The basic problem with the "unlimited discretion" approach, as we have seen, is that it was found to produce arbitrary and capricious results. Juries could decide whether a convicted criminal was to live or die on the basis of such irrelevant factors as the color of his skin, or his or her sex or religion or even mere physical appearance. The problem with a mandatory death penalty, by the same token, is (according to those who ruled against it in Woodson and Roberts) that such a law is also arbitrary in that it requires the execution of all persons convicted of a given capital offense - regardless of such arguably relevant factors as their past criminal records, the likelihood of future misconduct, or various other mitigating circumstances involved in each particular case. However, the "limited discretion" approach which was upheld by the Court in the Gregg, Proffitt and Jurek cases was found to be acceptable (a) because the death penalty is still not unconstitutional, per se, at least for those crimes such as murder for which it has traditionally been imposed[3] and (b) because the procedural safeguards of this approach appeared reasonably calculated to insure a rational imposition of the penalty.

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1 Including Justice Powell who had been among the dissenters in Furman.

2 See, also, Fowler v. North Carolina, __U.S.__, 44 L.W. 3761 (July 6, 1976); Thompson v. North Carolina, __U.S. ___, 44 L.W. 3761 (July 6, 1976); and Williams and Justus v. Oklahoma, __U.S.___, 44 L.W. 3761 (July 6, 1976).

3 Justices Brennan and Marshall dissenting.

II.

Questions Presented:

With this introductory resume of the current constitutional status of the death penalty in mind, we turn, now, to your specific questions. First you have asked:

> "Has our latest statute or portions thereof, the provisions of which were contained in Initiative 316, passed by the voters in November, 1975, been invalidated by the recent U.S. Supreme Court decisions?"

Before we respond directly to this question two further preliminary observations are in order. First, as was also true several years ago when the Supreme Court first ruled on the constitutionality of state laws regulating abortions,[4] the Court's decisions did not directly pass upon the provisions of our own state abortion law because that law (RCW 9.02.070) was not actually before the tribunal. Instead, those decisions involved statutes in two other states, Georgia and Texas. Nevertheless, as in the instant case it was, in our judgment, clear as a matter of law that the rulings in question had rendered portions of our own law henceforth "constitutionally unenforceable" in the sense which we explained in the following excerpt from AGO 1973 No. 7 (copy enclosed) - written shortly after those rulings were rendered:

> "We now come to the essence of your question: To what extent will the supreme court's decisions in Roe v. Wade and Doe v. Bolton, supra, affect the future enforceability of our existing statutes dealing with abortions.
>
> "Purely from a standpoint of form, of course, all of the provisions of these statutes will remain in our criminal code in the manner in which they now appear until they are either amended or repealed through the legislative process. Moreover, to the extent that they are not in clear conflict with the supreme court's rulings, these statutes remain entitled to an over-all presumption of

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4 See, Roe v. Wade, 410 U.S. 113, 35 L. ed. 2d 147, 93 S. Ct. 705 (1973) and Doe v. Bolton, 410 U.S. 179, 35 L. ed. 2d 201, 93 S.Ct. 739 (1973).

> constitutionality until held to be otherwise by a court of competent jurisdiction - both as a matter of office policy and as a matter of law. In the case of such conflicts as do exist between them and the supreme court's decisions, however, future enforcement will unquestionably be effectively precluded by these decisions for the obvious reason that in any prosecution brought to enforce a requirement of our statutes which conflicts with the supreme court's rulings, supra, the person or persons charged with a violation of these statutes will be able to invoke the federal constitution, as now interpreted by the supreme court, as a defense. Accord, so much of Article VI of the United States Constitution as provides that:
>
> "'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.'
>
> "We will, therefore, couch our ensuing conclusions in this light - i.e., enforceability rather than constitutionality, per se. . . ."

Likewise, in answering your first question as it relates to the impact of the Supreme Court's latest decisions regarding the death penalty upon what is now RCW 9A.32.046, infra, we will here also speak of the current enforceability of that law rather than of its constitutionality, per se.

Secondly, as we have noted earlier it is true that the new death penalty law, which was formulated largely under your sponsorship after the earlier Washington law (RCW 9.48.030)

was declared unconstitutional in State v. Baker, supra,[5] originated as Initiative No. 316 and, as such, was approved by the voters at the November, 1975, state general election.[6] The fact that this law was thus enacted by the people rather than the legislature, however, must be viewed as being of no legal significance in terms of its present constitutional enforceability because it is now a well-established principle that the power of the people to pass a law by the initiative process is no greater than that of the legislature, as such, and is subject to all of the same constitutional restrictions or limitations which pertain to an act of the legislature. See, e.g., Bare v. Borton, 84 Wn. 2d 380, 526 P. 2d 379 (1974).

Having so explained these two points we must now answer your first question essentially in the affirmative. Because it is a death penalty law of the same basic type as those held to be unconstitutional in Woodson v. North Carolina and Roberts v. Louisiana, supra,[7] so much of our new law as

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5 Accord, Furman v. Georgia, supra.

6 See, Wash. Const., Art. II, § 1 (Amendment 7); however, because the initiative was framed as an amendment to the new state criminal code it did not actually become operative until July 1, 1976 - as explained in AGO 1976 No. 4.

7 In Roberts the court specifically noted that the Louisiana statute, like Initiative No. 316, limited the category of crimes covered to certain aggravated offenses - in contrast to the North Carolina law which imposed the death penalty for any willful, deliberate or premeditated homicide and any felony murder. The court, however, ignored the distinction, saying:

> "That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. . . ." Roberts v. Louisiana, 44 L.W. at 5283.

provides for the automatic, mandatory, imposition of a death sentence for all persons convicted of aggravated murder in the first degree[8] is, in our opinion, now constitutionally unenforceable. By this we mean, specifically, that portion of Initiative No. 316 which is now RCW 9A.32-046 and reads, in full, as follows:

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[8] Defined in RCW 9A.32.045 as follows:

> "A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of the following circumstances:
>
> "(1) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing.
>
> "(2) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution.
>
> "(3) The defendant committed the murder pursuant to an agreement that he receive money or other thing of value for committing the murder.
>
> "(4) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.
>
> "(5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror.
>
> "(6) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

> "A person found guilty of aggravated murder in the first degree as defined in RCW 9A-.32.045, shall be punished by the mandatory sentence of death. Once a person is found guilty of aggravated murder in the first degree, as defined in RCW 9A.32.045, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the sentence of death. Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: Provided, That the time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof."

This statute, like those involved in the Woodson and Roberts cases, deprives the court or jury, as the case may be, of any discretion to impose a lesser penalty without regard to any mitigating circumstances which may be present in a given case. Or, as we expressed the point during our introductory discussion above, the Washington law, like those of North Carolina and Louisiana, ". . . requires the execution of all persons convicted . . . [of aggravated murder in the first degree] . . . regardless of such arguably relevant factors as their past criminal records, the likelihood of future misconduct, or various other mitigating circumstances involved in each particular case."[9]

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8 Cont'd:

> "(7) The defendant committed the murder in the course of or in furtherance of the crime of rape or kidnaping or in immediate flight therefrom."

9 Note, however, in connection with the answer to your first question, the following provisions of RCW 9A.32.047 (codifying § 3 of Initiative No. 316):

> "In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the

Question (2):

By your next question you have asked:

> "Can we have a capital punishment law that is constitutional in Washington State?"

This question, of course, assumes the foregoing response to your first question; i.e., that the present provisions of RCW 9A.32.046, supra, have become constitutionally unenforceable because of the Supreme Court's invalidation of similar mandatory death penalty statutes in Woodson v. North Carolina and Roberts v. Louisiana, supra. But at the same time the Court's 7-2 ruling in favor of the constitutionality of what we have above referred to as "limited discretion" death penalty laws in Gregg v. Georgia, Proffitt v. Florida and Jurek v. Texas, supra, makes it equally clear that a constitutionally valid statute may be fashioned for our own state as well. As explained by Justice Stewart, writing for the Court in Gregg:

> "In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing

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9 Cont'd:

> supreme court of the state of Washington in any of the circumstances specified in RCW 9A.32.045, the penalty for aggravated murder in the first degree in those circumstances shall be imprisonment in the state penitentiary for life. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner or reduce the period of confinement nor release the convicted person as a result of any automatic good time calculation nor shall the department of social and health services permit the convicted person to participate in any work release or furlough program."

> authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.
>
> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." (44 L.W. at 5242.)

Therefore, our direct answer to your second inquiry, as above set forth, is also in the affirmative. A law similar to those which were found to be valid in these last three cases would, if enacted by the Washington legislature (or the people through the initiative process), be constitutionally defensible. [10]

Although certain differences exist between the three death penalty laws which were thus upheld,[11] the basic element which they all have in common is that of a bifurcated trial whereby the accused person is first tried to determine his guilt or innocence of the crime with which he has been charged. At this initial trial only such evidence is admissible as is relevant to that single question. Then, if the

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10 We understand, in so advising you, that a stay order has been entered by Justice Powell with regard to actual implementation of the Gregg, Proffitt and Jurek rulings in connection with a petition for rehearing. If, as a result of that petition there is later any change in the views of the Court regarding the "limited discretion" types of death penalty law we will, of course, promptly advise you.

11 Compare, Ga. Code Ann. §§ 27-2503, 27-2534.1, 27-2514 and 26-3102 (Sup. 1975); Fla. Stat. Ann. § 921.141 (Sup. 1976-1977); and Texas Code of Crim. Proc., Art. 37.071 (Sup. 1975-1976).

accused is found guilty of a crime for which the death penalty may be imposed, a second hearing or trial is held for the purpose of determining whether, in fact, it should be. During this phase the jury (or court if the case was tried without a jury) is required to consider various specified aggravating and/or mitigating circumstances - including evidence which would not have been admissible under ordinary standards of relevancy during the "guilt or innocence" phase of the trial. Then, the question of punishment is to be decided on the basis of specified legal standards in accordance with the findings made at this second stage of the proceedings. Finally, at least in the case of the Georgia and Florida laws, any death penalty resulting from the trial is to be reviewed, automatically, by a higher court not only for the purpose of insuring that the proceedings below were properly conducted under the standards set forth in the law but that the death penalty imposed is consistent with other sentences imposed in other trials under similar circumstances.[12]

Questions (3) and (4):

Your next two questions, which we will consider together, read as follows:

> "Would changes to the invalidated statute to bring it into conformance with the U.S. Supreme Court decisions require a two-thirds vote of the Legislature if the changes were considered during the regular session of the 45th Legislature, convening in January, 1977?
>
> "Could the Legislature repeal the provisions of Initiative 316 and substitute a new law?"

These two questions stem from the above noted fact that our current death penalty statute (RCW 9A.32.046) originated as a part of an initiative to the people under Article II, § 1 (Amendment 7) of the state constitution. Thus, it is presumably

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12 Also of note in connection with this segment of your opinion request is a similar section of the Model Penal Code (Proposed Official Draft) which was prepared in 1962 by the American Law Institute. According to the Surpreme Court's opinion in Proffitt v. Florida, supra, the Florida statute which was there upheld was "largely patterned" after § 210.6 of that code. Therefore, we are appending a copy of this section of the Model Code to our opinion for your immediate reference.

now subject to so much of Article II, § 41 (Amendment 26) of the constitution as provides that:

> ". . . No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: Provided, That any such act, law or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon. These provisions supersede the provisions of subsection (c) of section 1 of this article as amended by the seventh amendment to the Constitution of this state."

We can conceive of no basis for concluding that the mandatory death penalty portion of Initiative No. 316 is in any way exempt from the provisions of this section of the state constitution merely because it has been rendered constitutionally unenforceable by reason of the Supreme Court's decisions in the Woodson and Roberts cases, with regard to the similar death penalty laws of North Carolina and Louisiana. Therefore, it may not now be repealed by the legislature - i.e., until November 5, 1977, or thereafter - and it may not be amended by the legislature until that time except by ". . . a vote of two-thirds of all of the members elected to each house. . . ."

We note also, however, the concluding sentence of Article II, § 41 (Amendment 26), supra, which, alternatively, permits an act approved by the voters to be thereafter amended or repealed at any time ". . . at any general regular or special election by direct vote of the people thereon. . . ." Accordingly, it would be possible for this or any other measure approved by the voters at the November 5, 1975, general election to be amended (or even repealed) by the affirmative action of less than a two-thirds majority of the members of each house of the

legislature approving a referendum bill submitted to the voters in the manner contemplated by subsection (b) of Article II, § 1 (Amendment 7) of the constitution.[13]

Questions (5) and (6):

Your final two questions also relate to the procedures which could be followed by the legislature in the enactment of a constitutionally valid death penalty law in accordance with Gregg v. Georgia, Proffitt v. Florida and Jurek v. Texas, supra. They are as follows:

> "5) Could the Legislature adopt a new capital punishment law without repealing the provisions of Initiative 316 with instructions that the new law be the applicable statute in cases involving the specified crimes?
>
> "6) If your answer to question 5 is in the affirmative, could the new law be adopted by a constitutional majority of the Legislature rather than two-thirds?"

The important point to be borne in mind with respect to these questions is that the death penalty provided for by Initiative No. 316 (i.e., RCW 9A.32.046) is, by its own terms, only applicable to the crime of aggravated murder in the first degree as defined therein. See, RCW 9A.32.045, supra, codifying § 1 of the initiative. Other sections of the new state criminal code, however, define first degree murder as a separate and, in effect, a lesser included offense and fix the penalty for that crime as life imprisonment. We have reference to RCW 9A.32.030 and .040, both of which originated with the new code itself, chapter 260, Laws of

13 This subsection reads as follows:

> "The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted. Six per centum, but in no case more than thirty thousand, of the legal voters shall be required to sign and make a valid referendum petition."

1975, 1st Ex. Sess., rather than as a part of Initiative No. 316.

Most certainly, therefore (in answer to your fifth question), the legislature could - by appropriately amending either or both of these sections of the new code - adopt a new capital punishment law for the crime of first degree murder (or other crimes as well by the same process) without either repealing or expressly amending any of the code sections which were added by the initiative. In effect, the defined crime in the initiative of aggravated murder in the first degree (RCW 9A.32.045) and its accompanying mandatory death penalty (RCW 9A.32.046) would simply be disregarded and rendered obsolete by means of this approach.

Logically, of course, this should also mean (in answer to your sixth and final question) that ". . . the new law could be adopted by a constitutional majority of the legislature rather than two-thirds. . ." even though enacted within the two-year period during which Article II, § 41 (Amendment 26), supra, will remain applicable to the provisions of Initiative No. 316 itself. At least we know of no cases in which a court, in an analogous situation, has yet ruled otherwise. This, however, does not mean that the proponents of a revised new death penalty law should necessarily feel content if they are able to persuade merely a simple majority of the members of the legislature to vote for a bill fashioned to avoid that constitutional provision.

In the first place, of course, more than a simple majority would be necessary to override a gubernatorial veto if that should occur. Accord, the provisions of Article III, § 12 of our constitution. But in addition, even if the governor were to approve of the bill the validity of any new death penalty law would presumably be litigated in the courts in any event - probably by the first person to be sentenced thereunder. At that time this issue would no doubt then be raised as a part of such litigation if the law in question were to have been passed by the legislature by less than a two-thirds majority during the first two years following the passage of the initiative. Therefore, while we believe the correct answer to your final question to be in the affirmative we would most certainly caution the proponents of any new death penalty legislation to seek the approval of such a

greater majority if possible, particularly if the new law includes a consideration of aggravating factors paralleling the language of Initiative No. 316, in lieu of a different list of aggravating circumstances or being a statute which allows resort to mitigating circumstances only. Or, in the alternative, those proponents could accomplish the same objective by having the bill referred to the people for their approval instead, in accordance with the second part of our answer to question (5), above.

This completes our consideration of your several questions regarding the Washington death penalty law as it has been impacted by the U.S. Supreme Court's recent decisions. We trust that the foregoing will be of assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General

Enc.

APPENDIX

MODEL PENAL CODE - DEATH PENALTY PROVISION

Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to

have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence which the Court deems to

have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(3) Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

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

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

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

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

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

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

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

# APPENDIX 14

## CHAPTER 206

[Substitute House Bill No. 615]

## DEATH PENALTY

AN ACT Relating to the death penalty; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040; amending section 1, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045; amending section 2, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046; amending section 3, chapter 9, Laws of 1975–'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047; adding a new chapter to Title 10 RCW; adding a new section to chapter 9.01 RCW; prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under section 2 of this 1977 amendatory act.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 2. (1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with section 1 of this 1977 amendatory act, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with section 1 of this 1977 amendatory act, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.





(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by section 1 of this 1977 amendatory act.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: PROVIDED, That the defendant is accorded a fair opportunity to rebut any hearsay statements: PROVIDED FURTHER, That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

Sec. 3. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((~~to life imprisonment~~)) as follows:

(1) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be death;

(2) If, pursuant to a special sentencing proceeding held under section 2 of this 1977 amendatory act, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment.

Sec. 4. Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 1) and RCW 9A.32.045 are each amended to read as follows:

((~~A person is guilty of aggravated murder in the first degree when he commits murder in the first degree as defined in RCW 9A.32.030 under or accompanied by any of~~)) (1) In a special sentencing proceeding under section 2 of this 1977 amendatory act, the following shall constitute aggravating circumstances:

(((~~1~~))) (a) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing and the victim was known or reasonably should have been known to be such at the time of the killing.

(((~~2~~))) (b) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution or had escaped or was on authorized or unauthorized leave from a state correctional institution, or was in custody in a local jail and subject to commitment to a state correctional institution.

(((~~3~~))) (c) The defendant committed the murder pursuant to an agreement that ((~~he~~)) the defendant receive money or other thing of value for committing the murder.

(((~~4~~))) (d) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.





(((~~5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror~~)) (e) The murder was of a judge, juror, witness, prosecuting attorney, a deputy prosecuting attorney, or defense attorney because of the exercise of his or her official duty in relation to the defendant.

(((~~6~~))) (f) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(((~~7~~))) (g) The defendant committed the murder in the course of ((~~or~~)), in furtherance of ((~~the crime of rape or kidnaping or in immediate flight therefrom.~~)), or in immediate flight from the crimes of either (i) robbery in the first or second degree, (ii) rape in the first or second degree, (iii) burglary in the first degree, (iv) arson in the first degree, or (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.

(h) The murder was committed to obstruct or hinder the investigative, research, or reporting activities of anyone regularly employed as a newsreporter, including anyone self-employed in such capacity.

(2) In deciding whether there are mitigating circumstances sufficient to merit leniency, the jury may consider any relevant factors, including, but not limited to, the following:

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

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

(c) The victim consented to the homicidal act;

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

(e) The defendant acted under duress or under the domination of another person;

(f) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect; and

(g) The age of the defendant at the time of the crime calls for leniency.

Sec. 5. Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 2) and RCW 9A.32.046 are each amended to read as follows:

((~~A person found guilty of aggravated murder in the first degree as defined in RCW 9A.32.045, shall be punished by the mandatory sentence of death.~~)) Once a person is found guilty of ((~~aggravated~~)) murder in the first degree((~~, as defined in RCW 9A.32.045~~)) under RCW 9A.32.030(1)(a) with one or more aggravating circumstances and without sufficient mitigating circumstances to merit leniency and the jury has made affirmative findings on both of the special questions submitted pursuant to section 2(10) of this 1977 amendatory act, neither the court nor the jury shall have the discretion to suspend or defer the imposition or execution of the

sentence of death. ((~~Such sentence shall be automatic upon any conviction of aggravated first degree murder. The death sentence shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof: PROVIDED, That~~)) The time of such execution shall be set by the trial judge at the time of imposing sentence and as a part thereof.

Sec. 6. Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess. (Initiative Measure No. 316, section 3) and RCW 9A.32.047 are each amended to read as follows:

In the event that the governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington ((~~in any of the circumstances specified in RCW 9A.32.045,~~)) the penalty under RCW 9A.32.046 ((~~for aggravated murder in the first degree in those circumstances~~)) shall be imprisonment in the state penitentiary for life without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner ((~~or~~)) nor reduce the period of confinement ((~~nor release the~~)). The convicted person shall not be released as a result of any ((~~automatic~~)) type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any ((~~work~~)) temporary release or furlough program.

NEW SECTION. Sec. 7. (1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington. The clerk of the trial court within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Washington together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of the defendant's attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington.

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

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

(a) Whether the evidence supports the jury's findings; and

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

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

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

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.





(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

NEW SECTION. Sec. 8. There is added to chapter 9.01 RCW a new section to read as follows:

No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself, his family, or his real or personal property, or for coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When a substantial question of self defense in such a case shall exist which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the state of Washington shall indemnify or reimburse such defendant for all loss of time, legal fees, or other expenses involved in his defense.

NEW SECTION. Sec. 9. Sections 1, 2, and 7 of this 1977 amendatory act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 10. If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 11. This 1977 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House June 3, 1977.
Passed the Senate June 2, 1977.
Approved by the Governor June 10, 1977.
Filed in Office of Secretary of State June 10, 1977.

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## CHAPTER 207

[Substitute House Bill No. 625]

## CENTRAL CREDIT UNIONS

AN ACT Relating to central credit unions; creating new sections; and adding a new chapter to Title 31 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. A central credit union may be organized and operated under this chapter. The central credit union shall have all the rights and powers granted in and be subject to all provisions of chapter 31.12 RCW which are not inconsistent with this chapter. Such credit union shall use the term "central" in its official name. Any central credit union in existence on the effective date of this act in the state of Washington shall operate under the provisions of this chapter.

NEW SECTION. Sec. 2. Notwithstanding any other provision of law, the central credit union may adopt bylaws enabling it to exercise any of the powers, as

# APPENDIX 15

Kitsap County Prosecuting Attorney
C. DANNY CLEM, Prosecutor
KITSAP COUNTY COURTHOUSE · 614 DIVISION STREET · PORT ORCHARD, WASHINGTON, 98366 · 876-7174

CHIEF CRIMINAL DEPUTY
Christian C. Casad

CHIEF CIVIL DEPUTIES
W. Daniel Phillips
Ronald A. Franz

DEPUTIES
Stephen E. Alexander
Warren K. Sharpe
Patricia K. Schafer
Kenneth G. Bell
Linda C. Krese
Reinhold P. Schuetz
Patricia A. Toth
Anthony C. Otto

December 31, 1980

The Honorable Earl F. Tilly
P.O. Box 1845
Wenatchee, Washington 98801

RE: New capital Punishment Act

Dear Representative Tilly:

Enclosed herewith is a proposed act concerning murder and capital punishment. We hope that this proposal will be passed by the 1981 legislature.

There are a number of reasons why our current capital punishment statute must be revised. First, the Washington Supreme Court in State v. Martin, 94 Wn. 2nd 1, _____ P. 2nd _____ (1980) seriously undermined the current statute by holding that a court rule gave the defendant the right to plead guilty to first degree murder and thus avoid imposition of the death penalty. Although the court did not hold that our current statute is unconstitutional, it is likely to do so. Argument before the court on several capital cases is now scheduled for January 13, 1981. Second, the current capital punishment scheme has many inconsistencies and deficiencies which must be remedied to avoid problems in the future. Lastly, the present statute is unduly restrictive as to when capital punishment can be imposed. Our proposal removes a number of hurdles which are not constitutionally required.

In a nutshell, the proposal establishes a new variety of murder called aggravated first degree murder. It is committed when one commits premeditated first degree murder with certain aggravating conditions. In a special sentencing proceeding if a jury finds that there are not sufficient mitigating circumstances to merit leniency, then the sentence is death. Otherwise, it is life imprisonment without parole. The proposal provides for the infliction of death by lethal injection.

The intent in drafting this proposal was not to be innovative. All of the concepts it contains have been approved by the United States Supreme Court.

We suggest that you review this proposal with the utmost scrutiny and, more importantly, for constitutional validity. This proposal, if enacted, will have to withstand a multitude of attacks from defense lawyers and those opposed to capital punishment. If there are problems in this proposal, now is the time to deal with them.

Very truly yours,

C. DANNY CLEM
Prosecuting Attorney

RONALD A. FRANZ
Deputy Prosecuting Attorney

RAF:jhpc

RAF:cim/jhpc
December 31, 1980

AN ACT CONCERNING MURDER AND CAPITAL PUNISHMENT

Section 1. Legislative declaration.

The Legislature declares that the greatest freedom our citizens can have is the freedom to be secure in their persons and to live without fear of assault or death as a consequence of criminal acts. To this end it is declared that there are certain varieties of murder which are especially henious and for which the perpetrators thereof deserve the harshest punishment which a civilized society can exact. The Legislature therefore enacts this legislation to provide a sentence of death for those who commit certain particularly egregious murders to the ends that others will be deterred, that murderers receive punishment commensurate with their crimes, that there be adequate retribution for the families and friends of murder victims, and/or so that the sanctity of life is enhanced by suffering the ultimate penalty on those who take life.

The Legislature recognizes that no criminal justice system consisting as it does of police, prosecutors, judges, and juries can apply any criminal statute with mathematical precision but that is no reason to forego capital punishment for those individuals who deserve it.

Section 2. Construction. This act shall be liberally construed to give effect to its purposes and, to this end, the rule of lenity shall have no application.

No rule promulgated by the Washington Supreme Court, now or in the future, pursuant to RCW 2.04.190 and RCW 2.04.200 shall be construed to degradate any of the provisions of this act.

Section 3. First degree murder -- sentence. Notwithstanding RCW 9A.32.030(2) any person convicted of the crime of first degree murder shall be sentenced to life imprisonment, which sentence shall not be suspended or deferred.

Section 4. Aggravated first degree murder. A person is guilty of aggravated first degree murder when he commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(a) The victim was a law enforcement officer, corrections officer or firefighter who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the perpetrator to be such at the time of the killing;

(b) At the time of the act resulting in the death, the perpetrator was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(c) At the time of the act resulting in death, the perpetrator was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a

felony;

(d) The perpetrator committed the murder pursuant to an agreement that he would receive money or other thing of value for committing the murder;

(e) The defendant had solicited another person to commit the murder and had paid or had agreed to pay money or other thing of value for committing the murder;

(f) The victim was a judge, juror or former juror, prospective, current or former witness in an adjudicative proceeding, prosecuting attorney, deputy prosecuting attorney, defense attorney, legislator, or elected official in the executive branch of state government and the murder was a result of legitimate duties performed or to be performed by such victim;

(g) The perpetrator committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(h) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the perpetrator;

(i) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(1) Robbery or attempted robbery in the first or second degree;

(2) Rape or attempted rape in the first or second degree;

(3) Burglary or attempted burglary in the first or second degree;

(4) Kidnapping or attempted kidnapping in the first degree;

(j) The victim was regularly employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research or reporting activities of such victim.

Section 5. Aggravated first degree murder -- sentence.

Any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole; Provided, if, pursuant to a special sentencing proceeding held under Section 7, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

A person sentenced to life imprisonment under this Section shall not have that sentence suspended, deferred or commuted by any judicial officer and the Board of Prison Terms and Paroles or its successor shall never parole such prisoner nor reduce the period of confinment in any manner whatsoever including, but by no means limited to, any sort of good-time calculation. The Department of Social and Health Services or its successor or any executive official shall never permit such prisoner to participate in any sort of release or furlough program.

Section 6. Notice regarding special sentencing proceeding.

When a person is charged with aggravated first degree murder as defined by Section 4, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

The notice of special sentencing proceeding shall be filed and served on the defendant or his attorney within thirty (30) days of the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant shall not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any included offense.

Unless the notice of special sentencing proceeding is filed and served as provided herein, the death penalty shall not be sought.

Section 7. Special sentencing proceeding -- procedure.

(a) When a defendant is adjudicated guilty of aggravated first degree murder under Section 4, whether by acceptance of a plea of guilty, by verdict of a jury, or by

decision of the trial court sitting without a jury, if a notice of special sentencing proceeding has been filed and served as provided by Section 6, then a special sentencing proceeding shall be held.

(b) A jury shall decide the matters presented in the special sentencing proceeding unless a jury be waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney; Provided, no sort of plea, admission or agreement shall abrogate the requirement of such special sentencing proceeding.

(c) In the event that the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding and such proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined; Provided, if unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss such jury and convene a jury pursuant to subsection (d).

(d) In the event that the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury or in the event that a retrial of the special sentencing proceeding is necessary for any reason including, but not limited to, a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel

a jury of twelve plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge six jurors. When there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and when there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

(e) At the commencement of the special sentencing proceeding the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in Section 5.

(f) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side until the evidence is concluded. Upon conclusion of the evidence the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(g) At the special sentencing proceeding the court shall admit any relevant evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity, which it deems to have probative value regardless of its admissibility under the usual rules of evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(h) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously. In order to return a negative answer to the question posed by this subsection, the jury must so find with at least ten (10) votes. If the jury after due deliberation is unable to answer the question posed by this subsection,

the trial court may declare a mistrial.

Section 8. Mitigating circumstances. In deciding the question posed by Section 7(h), the jury or the court, if a jury be waived, may consider any relevant factors including, but not limited to, the following:

(a) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(b) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(c) Whether the victim consented to the act of murder;

(d) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(e) Whether the defendant acted under duress or domination of another person;

(f) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(g) Whether the age of the defendant at the time of the crime calls for leniency;

(h) Whether there is a likelihood that the defendant will pose a danger to others in the future.

Section 9. When death penalty mandatory. When a

defendant is adjudicated guilty of aggravated murder in the first degree and when a jury answers affirmatively the question posed by Section 7(h) or, if a jury be waived as allowed by Section 7(b), when the trial court answers affirmatively the question posed by Section 7(h), then the defendant shall be sentenced to death and the trial court shall not suspend or defer the imposition of such sentence.

Section 10. Life imprisonment under certain circumstances. In the event that the governor commutes a death sentence or in the event that the death penalty is held to be invalid by an appellate court of the State of Washington or a federal court or in the event that a sentence of death imposed upon a particular defendant is held to be invalid by an appellate court of the State of Washington or a federal court, then the sentence for aggravated first degree murder where there is an affirmative response to the question posed by Section 7(h) shall be imprisonment in the state penitentiary for life without the possibility of release or parole.

A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred or commuted by any judicial officer and the Board of Prison Terms and Paroles or its successor shall never parole such prisoner nor reduce the period of confinement in any manner whatsoever including, but by no means limited to, any sort of good-time calculation. The Department of Social and Health Services or its successor or any elected official shall never permit such prisoner to participate

in any sort of release or furlough program.

Section 11. Mandatory review of death sentence.

(a) Whenever a defendant is sentenced to death and upon entry of the judgment and sentence in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington.

(b) Within ten (10) days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court and to the parties. Such notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. Such notice shall vest with the supreme court the jurisdiction to review the sentence of death as provided herein; Provided, the failure of the clerk of the trial court to provide the notice as herein required shall in no way prevent the supreme court from conducting the sentence review as provided herein.

(c) Within ten (10) days of the entry of a judgment and sentence imposing the death penalty, the defendant or his attorney shall cause a verbatim report of proceedings of the trial to be prepared.

(d) Within five (5) days of the filing and approval of the verbatim report of proceedings, the clerk of the

trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court. The clerk of the supreme court shall forthwith acknowledge receipt of such documents by providing notice of such receipt to the clerk of the trial court and to the defendant or his attorney and to the prosecuting attorney.

(e) Within twenty (20) days of the entry of the judgment and sentence imposing the death penalty, the trial court shall submit a report to the clerk of the supreme court, to the defendant or his attorney, and to the prosecuting attorney which shall be in the following form and which form shall be supplied to the trial judge by the clerk of the supreme court:

Report of Trial Judge
To The Supreme Court
Regarding Death Penalty Case

Superior Court of _____ County, Washington.

Cause No. _____

State v. _____

INSTRUCTIONS: Please answer each question. If you do not have sufficient information to supply an answer, please so indicate after the specific question. If sufficient space is not allowed on the questionnaire form for answer to the question, attach additional sheets.

If the death penalty has been imposed on more than one

defendant in a joint trial, make out a separate questionnaire for each defendant.

## A. Data Concerning the Defendant

1. Name _____ 2. Date of Birth _____
   Last First Middle

3. Sex: M [ ] F [ ]

4. Marital Status:
   - Never Married [ ]
   - Married [ ]
   - Divorced [ ]
   - Spouse deceased [ ]

5. Race or ethnic origin of defendant _____
   (Specify)

6. Children
   (a) Number of children _____
   (b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
   (Circle age of each child)

7. Parents
   (a) Father living: Yes [ ] No [ ]
   If deceased, date of death _____
   (b) Mother living: Yes [ ] No [ ]
   If deceased, date of death _____

8. Number of children born to parents: _____

9. Education--circle highest grade completed: 1 2 3 4 5 6 7 8 9 10 11 12
   College: 1 2 3 4

10. Intelligence Level: Low [ ] IQ Score: _____
    Medium [ ]
    Above Average [ ]
    High [ ]

11. Psychiatric Evaluation Performed? Yes [ ] No [ ]

If performed, did report indicate that defendant is

(a) able to distinguish right from wrong? Yes [ ] No [ ]
(b) able to perceive nature & quality of act? Yes [ ] No [ ]
(c) able to cooperate intelligently in own defense? Yes [ ] No [ ]

12. If examined, were character or behavior disorders found? Yes [ ] No [ ]

If so, please elaborate: _____

_____

13. Other pertinent psychiatric and/or psychological information revealed? Yes [ ] No [ ]

(Explain) _____

_____

14. Prior work record of defendant:

| Type of Job | Pay | Dates Held | Reason for Termination |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

15. Does the defendant have a record of prior convictions? Yes [ ] No [ ]

16. If the answer is yes, list the offenses, dates of the convictions and sentence imposed:

| Offense | Date | Sentence Imposed |
|---|---|---|
| | | |
| | | |
| | | |

17. Length of time defendant has resided in

Washington: _____ County: _____

## B. Information Concerning the Trial

1. How did the defendant plead to the charge of aggravated murder in the first-degree?

   Guilty [ ]
   Not guilty [ ]
   Not guilty by reason of insanity [ ]

2. Was the defendant represented by counsel? Yes [ ] No [ ]

3. Please indicate if there was evidence of defense(s) to the crime of aggravated murder in the first-degree. Were instruction(s) given as to such defense(s)?

| | Evidence | Instruction(s) |
|---|---|---|
| Excusable homicide | [ ] | [ ] |
| Justificable homicide | [ ] | [ ] |
| Insanity | [ ] | [ ] |
| Duress | [ ] | [ ] |
| Entrapment | [ ] | [ ] |
| Alibi | [ ] | [ ] |
| Intoxication | [ ] | [ ] |
| _____ (specify other) | [ ] | [ ] |

4. Was the defendant charged with other offenses which were tried in the same trial? Yes [ ] No [ ]

   If yes, list the other offenses below and indicate if defendant was convicted of such other offenses.

| | Convicted |
|---|---|
| _____ | Yes [ ] No [ ] |
| _____ | Yes [ ] No [ ] |
| _____ | Yes [ ] No [ ] |

5. What aggravating circumstances were alleged against the defendant?

   _____

   _____

   _____

6. What aggravating circumstances was the defendant found to

have committed?

_____

_____

_____

7. If the defendant was tried jointly with another defendant or defendants, list name(s) of other defendant(s).

_____

8. List offenses charged against co-defendant(s) and indicate convictions.

| Offenses charged | Conviction |
|---|---|
| _____ | [ ] |
| _____ | [ ] |
| _____ | [ ] |

C. Information Concerning Special Sentencing Proceeding

1. Dates

Date defendant adjudicated guilty: _____

Date special sentencing proceeding commenced: _____

2. Was the jury for the special sentencing proceeding composed of the same jurors as the jury that returned the verdict to the charge of aggravated murder? Yes [ ] No [ ]

If the answer to the above question is no, please explain:

_____

_____

_____

3. Was there evidence of mitigating circumstances? Yes [ ] No [ ]

4. If so, in your opinion was there some credible evidence on any of the following mitigating factors:

| | Favorable to defendant | Unprovable to defendant |
|---|---|---|
| a. No significant history of prior criminal activity | [ ] | [ ] |
| b. Extreme mental disturbance | [ ] | [ ] |
| c. Consent of victim | [ ] | [ ] |
| d. Defendant's participation relatively minor | [ ] | [ ] |
| e. Under duress or domination of another | [ ] | [ ] |
| f. Substantially impaired by mental disease or defect | [ ] | [ ] |
| g. Age calls for leniency | [ ] | [ ] |
| h. Defendant a danger to others | [ ] | [ ] |
| i. Other: (specify) _____ | [ ] | [ ] |
| j. Other: (specify) _____ | [ ] | [ ] |

5. Did the jury return a finding that it was unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? Yes [ ] No [ ]

D. Questions Relating to Victim

1. Was the victim related by blood or marriage to the defendant? Yes [ ] No [ ]

If the answer is yes, what was the relationship?_____

_____

2. Was the victim an employer or employee of defendant?
Yes [ ] No [ ]
Employee [ ]
Employer [ ]

3. Was the victim acquainted with the defendant?
Yes [ ] No [ ]
Casual acquaintance [ ]
Friend [ ]

4. Length of time victim resided in Washington: _____
County: _____

5. Was the victim of the same race or ethnic origin as defendant? Yes [ ] No [ ]

6. Was the victim the same sex as the defendant? Yes [ ] No [ ]

7. Was the victim held hostage during the crime?
No [ ]
Yes--less than one hour [ ]
Yes--more than one hour [ ]

8. Occupation of victim: _____

9. Was the victim physically harmed or tortured? Yes [ ] No [ ]

If yes, state extent of harm or torture: _____

_____

_____

10. What was the age of the victim? _____

11. If a weapon was used in the commission of the crime, was it:

| | |
|---|---|
| Firearm | [ ] |
| Blunt instrument | [ ] |
| Sharp instrument | [ ] |
| Poison | [ ] |
| Other: _____ | [ ] |

## E. Representation of Defendant

(If more than one attorney represented the defendant, answer each question separately as to each attorney.)

1. Date counsel secured: _____

2. How was counsel secured?

(a) Retained by defendant [ ]
(b) Appointed by court [ ]

3. If counsel was appointed by court, reason for appointment was:

(a) Defendant indigent [ ]
(b) Other (explain) [ ]

_____

_____

4. How many years has counsel practiced law?

(a) 0 to 5 [ ]
(b) 5 to 10 [ ]
(c) Over 10 [ ]

5. What is the nature of counsel's practice?

(a) Mostly civil [ ]
(b) General [ ]
(c) Mostly criminal [ ]

6. Did the same counsel serve throughout the trial and special sentencing proceeding? Yes [ ] No [ ]

If the answer is no, explain in detail:_____

_____

_____

## F. General Considerations

1. Was race and/or ethnic origin raised as an issue in the trial? Yes [ ] No [ ]

2. What percentage of the population of your county is the same race or ethnic origin as the defendant?

| | Race | Ethnic Origin |
|---|---|---|
| (a) Under 10% | [ ] | [ ] |
| (b) 10 - 25% | [ ] | [ ] |
| (c) 25 - 50% | [ ] | [ ] |
| (d) 50 - 75% | [ ] | [ ] |
| (e) 75 - 90% | [ ] | [ ] |
| (f) Over 90% | [ ] | [ ] |

3. Were members of defendant's race and/or ethnic origin represented on the jury?

Race: Yes [ ] No [ ]
Ethnic Origin: Yes [ ] No [ ]

4. If the answer to question 3 is no, was there any evidence that there were systematically excluded from the jury?

Yes [ ] No [ ]

5. Was there mention during the trial that the defendant had unusual sexual preferences, such as homosexuality or lesbianism?
Yes [ ] No [ ]

6. Was the jury specifically instructed to exclude either race, ethnic origin or sexual preference as an issue?
Yes [ ] No [ ]

If yes, please give the reference number(s) of specific jury instructions: _____

_____

7. Was there extensive publicity in the community concerning this case?
Yes [ ] No [ ]

8. Was the jury instructed to disregard such publicity?
Yes [ ] No [ ]

9. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when considering its verdict or considering findings in the special sentencing proceeding?
Yes [ ] No [ ]

10. If the answer to the previous question is yes, what was that evidence? _____

_____

_____

11. General comments of the trial judge concerning the appropriateness of the imposition of the death penalty, considering both the crime, the defendant, and other relevant factors.

_____

_____

_____

_____

_____

G. Chronology of Case

Elapsed days:

1. Date of offense _____ _____

2. Date of arrest _____ _____

3. Date trial began _____ _____

4. Date jury returned verdict _____ _____

5. Date post-trial motions ruled on _____ _____

6. Date special sentencing proceeding began _____ _____

7. Date special sentencing proceeding completed _____ _____

8. Date death penalty imposed _____ _____

9. Date trial judge's report completed _____ _____

10. Date trial judge report filed _____ _____

_____
Judge, Superior Court of _____ County

Date _____, 19____

(f) The sentence review required by Section 11(a) shall be in addition to any appeal. Such review and appeal shall be consolidated for consideration. The defendant and the prosecuting attorney shall be entitled to submit briefs within the time prescribed by the court and to present oral argument to the court.

(g) With regard to the sentence review required by Section 11(a) the supreme court shall determine:

(1) Whether there was sufficient evidence to support a verdict or finding of guilt to aggravated first degree murder; or

(2) Whether the plea of guilty to aggravated first degree murder was knowingly, intelligently, and voluntarily made; and

(3) Whether there was sufficient evidence to justify the affirmative finding to the question posed by Section 7(h); and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection "similar cases" shall mean cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965 in which the trier of fact considered the imposition of capital punishment regardless of whether it was imposed or executed; and

(5) Whether the sentence of death was brought about through passion or prejudice.

(h) Unless the procedures specified below would be nugatory as a consequence of relief afforded a defendant through an appeal, the following shall occur upon completion of the sentence review:

(1) If the court finds in the negative to any of the questions posed by Section 11(g)(1),(2) and (3) or in the affirmative to either of the questions posed by Section 11(g)(4) and (5), it shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with Section 10.

(2) If the court finds in the affirmative to the questions posed by Section 11(g)(1) or (2) and (3) and in the

negative to the questions posed by Section 11(g)(4) and (5), then it shall affirm the sentence of death and remand the case to the trial court for execution of sentence in accordance with Section 12.

(i) In all cases in which a sentence of death has been imposed, the appeal, if any there be, and sentence review to or by the supreme court shall be decided and an opinion on the merits shall be filed within one hundred and eighty (180) days of receipt by the clerk of the supreme court of the verbatim report of proceedings and clerk's papers as provided by Section 11(d). In any case in which this time requirement is not met, the chief justice of the supreme court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

Section 12. Procedure upon affirmance of death penalty. When a death sentence is affirmed and the case remanded to the trial court as provided in Section 11(h)(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. Such warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court and shall appoint a day in which the judgment and sentence of the court shall be executed by

the superintendent, which day shall not be less than thirty (30) nor more than ninety (90) days from the date the trial court receives the remand from the supreme court.

Section 13. Custody of defendant after imposition of death sentence. Within the ten (10) days after the trial court enters a judgment and sentence imposing the death penalty and both prior to and subsequent to the issuance of the death warrant as provided in Section 12, the defendant shall be imprisoned in the state penitentiary. During such period of imprisonment such defendant shall be confined in segregation from other prisoners not under sentence of death and the superintendent of the penitentiary shall not suffer or permit any person to visit, converse or communicate with such defendant excepting the attendants of the penitentiary, legal, spiritual and medical advisers, and the members of the immediate family of such defendant.

Section 14. Execution of death sentence.

(a) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary.

(b) In the event that the execution of the sentence of death as provided by Section 14(a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be inflicted by hanging by the neck which shall be

supervised by the superintendent of the penitentiary.

(c) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

Section 15. Record and return on execution of death sentence.

(a) The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of his acts in pursuance of such warrants.

(b) Within twenty (20) days of each execution of sentence of death the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it came with his return thereon showing all acts and proceedings done by him thereunder.

Section 16. Procedure on failure to execute. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant came and the trial court shall issue a new death warrant in accordance with Section 12.

Section 17. Repealer. The following statutes are hereby repealed. RCW 9A.32.040, 9A.32.045, 9A.32.046, 9A.32.047, 10.49.010, 10.70.040, 10.70.050, 10.70.060, 10.70.070, 10.70.080, 10.70.090, 10.70.100, 10.70.110, 10.70.120, 10.70.130, 10.94.010, 10.94.020, 10.94.030, and 10.94.900.

Section 18. Act effective immediately. This act is necessary for the immediate preservation of the public peace,

health, safety and welfare and shall be effective immediately.

Section 19. Severability. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances shall not be affected.

RAF:jhpc
December 31, 1980

# EXPLANATORY MATERIAL FOR "AN ACT CONCERNING MURDER AND CAPITAL PUNISHMENT"

Hereinafter is a section-by-section explanation of a proposed act entitled "An Act Concerning Murder And Capital Punishment". This material should provide the reasons why this proposal is the way it is -- in both what it does contain and does not contain.

While the proposal is by no means cast in stone, any changes should be made with caution. An alteration in or to one section could very likely impact some other section and could, ultimately, introduce a fatal flaw into what is intended to be a concise, consistent statutory scheme.

The goals of this proposal are as follows:

(1) To correct the deficiencies found in our current statutes in State v. Martin, 94 Wn. 2d 1, _____P.2d _____ (1980);

(2) To elimate various requirements from our current statutes which are not constitutionally necessary;

(3) To eliminate numerous problems and inconsistencies present in our current statutes; and

(4) To anticipate and provide for, to the greatest extent possible, the elimination of obstacles to the execution of certain murderers.

This proposal seeks not to be innovative. The road from the commission of a murder to the ultimate execution of the murderer is a long one which is fraught with pitfalls. Innovation in legislation of this sort must be avoided if at all possible. Therefore, this proposal relies upon concepts which have already been approved by the United States Supreme Court.

SECTION 1.

This section contains a legislative declaration of what the act is intended to do. Such a declaration can be helpful to a court in interpreting legislation because it sets the stage and lets a court know what it is that the legislature wants to accomplish.

The substance of this declaration is the statements typically advanced in support of capital punishment. The last paragraph of the declaration is an acknowledgment that capital punishment cannot be imposed with mathematical precision but that such imperfections in our justice system are not sufficient to abandon capital punishment.

SECTION 2.

This section provides instructions to a court construing the act on what rules of statutory construction to use. It should ultimately buttress the act against the attacks that will unquestionably come.

Typically, a criminal statute is strictly construed but this section requires that it be liberally construed. This basically tells a court not to nitpick.

The rule of lenity is a rule of statutory construction applied to avoid harsh results to defendants when there is some ambiguity in a statute. Its application to this statute can serve no useful purpose.

The legislature by RCW 2.04.190 and 2.04.200 has empowered the Supreme Court to make rules to govern the judicial process. In State v. Martin, id. it was a court rule which the court said gave a defendant the right to plead guilty and thus avoid the death penalty. It can be argued that this court-made rule over-rode the intent of the legislature to pass a constitutional captial punishment statute. Thus, it is desirable to remove the court's power to enact rules which can be used to thwart the legislative purpose. As long as a court rule did not conflict with any provision of this act, it would be applicable and valid. This does not guarantee, of course, that this act will never run afoul of a court rule because the court could say that it still had the power to enact some rule through its "inherent powers".

SECTION 3.

This section establishes the penalty for a non-capital, non-aggravated first degree murder. While an act which deals largely with capital punishment is not a particularly appropriate place to establish the penalty for this variety of murder, the current statute, RCW 9A.32.040, does so and it will be necessary to repeal RCW 9A.32.040 in the enactment of this

proposal.

RCW 9A.32.030(2) states that first degree murder is a class A felony. Thus, without the language of this section first degree murder would be punishable by from twenty (20) years to life imprisonment.

SECTION 4.

This section creates a new category of murder called aggravated first degree murder for which the penalty is life imprisonment without parole. A conviction for aggravated first degree murder is the predicate for a special sentencing proceeding through which the death penalty may be imposed. This reflects a substantial change from our current statute where the aggravating circumstance is proved in the sentencing proceeding. Under this proposal the aggravating circumtances is proved in the first phase of the trial -- it is essentially an additional element of the crime of premeditated first degree murder which, of course, must be proved beyond a reasonable doubt. Texas has a statute similar to that proposed here where the aggravating factor is an element of the crime which is proved at the "guilt" stage of the trial. The Texas statute was upheld in Jurek v. Texas, 428 U.S. 153, 96 S. Ct. 2950, 49 L. Ed. 2d 929(1976).

We contemplated proposing that all varieties of first degree murder, i.e. premeditated and first degree felony murder, be available as the predicate for a special sentencing proceeding through which the death penalty could be levied. Ultimately

we elected not to do so because such would require the alteration of some of the aggravating circumstances presently in our current statute and because it seems fair that a premeditated murder be the predicate for the ultimate penalty.

The aggravating factors set forth in subsection (a) - (j) are largely drawn from the current statute, RCW 9A.32.045. There are some changes which are explained below:

Subsection (a): In addition to the murder of a police officer and firefighter, the murder of a corrections officer is an aggravating factor. Corrections officers need the protection that capital punishment will provide.

Subsection (b): The term "state correctional institution" has been broadened to "state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes". Thus, as expanded, the proposal includes those incarcerated or escaped from all state prisons, half-way houses, honor camps, some programs at state hospitals, and so forth. This revisions avoids an argument that capital punishment is available only when one is incarcerated at or escapes from the correctional facility at Shelton.

Subsection (c): The current statute covers murders while incarcerated in or escaped from a local jail while one is subject to commitment to a correctional

facility. The proposal is expanded to cover murders while incarcerated in or escaped from a jail after having been adjudicated guilty of a felony. This not only covers those awaiting transfer to prison but also covers those serving time in jail as a condition of a deferred or suspended sentence in a felony conviction.

Subsections (d) and (e): These deal with murder for hire and are changed in no material way from the current statute.

Subsection (f): This concerns the murder of certain people involved in the judicial system and state government. It adds protection to state legislators and to elected officials of the executive branch of state government. It is revised to avoid the facial narrowness of the current statute concerning the murder of those involved in the judicial process. For example, under the current statute, if a judge were murdered by an irate husband because of a proceeding against his wife, there would not be an aggravating factor because the murder was not the result of the judge's relation to the husband. This deficiency and others are cured by the proposal.

Subsection (g): This adds an aggravating factor for a murder committed to conceal commission of a crime. This aggravating factor was present in

our former, mandatory death penalty statute. Perhaps, under our current statute, it was thought that this aggravating factor was included by the murder of a "witness". However, one is probably not a "witness" until he has actually testified in a proceeding or is at least subpoenaed to testify.

Subsection (h): This covers multiple murders and is unchanged from current statute.

Subsection (i): This expands coverage for murders committed in the course of certain crimes. For all crimes attempts have been added. Under our current statute a murder committed in the attempt to commit the enumerated crimes would not be an aggravated murder. Thus, a murder committed in an attempted robbery which failed because the victim had no money would not, under our present scheme, be an aggravated murder. The proposal rectifies this deficiency.

Added to the list of crimes in which an aggravated murder is possible is second degree burglary. Under the current statute a murder committed in the course of a first degree burglary, i.e. the burglary of a dwelling, is aggravated but one committed in the burglary of a building, e.g. a store or warehouse, is not. The proposal, by adding second degree burglary, would make the murder of a storekeeper or warehouseman in the course of a burglary aggravated murder.

Subsection (j): This remains basically the same as the present statute where the murder of a newsreporter can be an aggravated murder.

SECTION 5.

This section establishes the penalty for aggravated murder as life imprisonment without the possibility of release or parole. However, if in a special sentencing proceeding the judge or jury finds that there are not sufficient mitigating circumstances to merit leniency, then the penalty is death.

SECTION 6.

This section provides for the notice of special sentencing proceeding through which the death penalty may be imposed. The notice must be filed within thirty (30) days of the defendant's arraignment on a charge of aggravated first degree murder unless the period for filing the notice is extended by the court.

During the period in which the notice may be filed, the defendant may not plead guilty to the murder with which he is charged. This corrects one of the problems in our current statute found by the court in State v. Martin, supra. This time is needed by the prosecuting attorney to adequately determine if a particular defendant is a suitable candidate for the death penalty. Such an investigation typically requires an extensive records and background investigation of the defendant from sources not quickly available.

SECTION 7.

This section concerns the nature of the special sentencing

proceeding and contains the heart of this proposed capital punishment scheme. Its subsections (a) - (h) will be discussed individually.

Subsection (a): This requires that a special sentencing proceeding be held when a defendant is found guilty of aggravated first degree murder if notice thereof has been served and filed. It also makes it clear that guilt can be established by jury verdict, court trial, or by plea of guilty.

Subsection (b): This provides that a jury shall sit in the special sentencing proceeding unless a jury be waived with the consent of the court and both parties. It further provides that there can be no sort of admission to the questions presented in the special sentencing proceeding -- there must be a trial.

This subsection reflects a firm belief in and preference for a jury in the special sentencing proceeding. Serious consideration, however, was given to having only a judge or judges preside at the special sentencing proceeding. In Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913(1976) the Supreme Court upheld a sentencing procedure wherein the jury gave an advisory verdict but the ultimate decision on life or death rested with the judge. The three justices who announced the decision of the court in Proffitt had some comments that were quite favorable to judge, rather than jury, sentencing because judges have more

expertise in performing the sentencing function. After the decision in Proffitt the court decided Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973(1978). The Ohio statute provided for no jury input of any kind into the sentencing function. The court specifically declined to rule whether judge-sentencing in a capital case violated one's right to a jury trial. Thus, we believe that judicial sentencing in a capital case is an open question and is too risky for inclusion into this proposal. Ultimately, therefore, we rejected judicial sentencing having in mind the potential constitutional challenge and the factors which favor jury sentencing which are set forth below:

(1) A jury can reflect the conscience of the community as to whether a defendant will live or die;

(2) Placing a life or death decision in the hands of one person -- even an experienced trial judge -- is a very heavy burden; and

(3) Washington has a long history of allowing juries to decide a defendant's fate in a capital trial.

Subsection (c): This requires that the same jury that decided the defendant's guilt also hear the special sentencing proceeding if such is possible. There is an escape valve, however. If for some reason

the same jury cannot hear the sentencing proceeding, e.g. a juror becomes ill, then the trial jury can be dismissed and another jury empaneled. This is an important procedural provision not provided for in our current statute.

Subsection (d): This subsection introduces flexibility in empaneling juries for special sentencing proceedings. It covers empaneling a jury where guilt was established by plea or court trial. It also provides for the retrial of special sentencing proceeding as a consequence of a mistrial in a previous sentencing proceeding or as a result of a remand from an appellate court due to an error in a special sentencing proceeding which had been appealed.

The subsection also provides for the selection of jurors for the sentencing proceeding. The language having to do with jury selection is drawn largely from CrR 6.4 and 6.5.

Subsection (e): This requires that the jury be advised of the consequences of its finding in the special sentencing proceeding. This is taken from our current statute, RCW 10.94.020(3).

Subsection (f): This simply establishes the contents and order in the special sentencing proceeding regarding argument and presentation of evidence.

Subsection (g): This provides that any relevant evidence which has probative value is admissible in the special sentencing proceeding and, in this regard, it is similar to the current statute. It provides for the admission of hearsay evidence which, under some circumstances, is constitutionally required by Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, ____ L. Ed. 2d _____ (1979). Evidence of previous criminal activity of the defendant is specifically mentioned as being admissible because it is such an important factor in determining if a death penalty is appropriate for a specific defendant.

Also admissible is evidence concerning the crime of aggravated first degree murder if the jury at the sentencing proceeding was not the jury that decided his guilt. This is important for the jury must be apprised of the nature of the crime for it is against the backdrop of the crime that it weighs if there are circumstances to merit leniency.

The current statute proscribes the admission of evidence secured in violation of the federal or state constitutions. This proscription has been omitted. Such is not to suggest, however, that such evidence must be admitted. Rather, it was deleted for the following reasons:

(1) Under the usual rules of evidence some

evidence secured in violation of our constitutions is admissible, e.g. statements secured in violation of one's Miranda rights are admissible for impeachment purposes; and

(2) In light of the broad variety of evidence which is constitutionally required to be admitted, the statutory prohibation against admission of some types of evidence could be itself constitutional error.

Subsection (h): This subsection contains the touchstone of the special sentencing proceeding. There is only a single question presented in the proceeding. If the jury is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, then the sentence is death. However, if at least ten jurors are not convinced beyond a reasonable doubt that there are not sufficient mitigating facts to merit leniency, then the sentence is life imprisonment without release or parole. If the jury is unable to decide one way or the other, the court may declare a mistrial just as in any other case where the jury cannot return a verdict. The possibility of a mistrial and, eventually, another special sentencing proceeding is important, for some jurors when put to the test of deciding a question upon which a person's life depends, simply

cannot do so. The current statute contains no provision concerning what happens if the jury is unable to answer the questions in the sentencing proceeding.

This subsection contains some significant departures from our current statute in both what it does and does not contain. In the current statute there are four questions in the sentencing proceeding having to do with aggravating circumstances, mitigating circumstances, guilt with clear certainty, and probability of future criminal acts.

In this proposal the aggravating circumstance is shifted from the sentencing proceeding to the "guilt" phase in which it is an additional element of the crime of premeditated murder. The question concerning mitigating circumstances is retained in this proposal in largely the same form as the current statute.

The question having to do with guilt with clear certainty has been deleted. Apparently it is supposed to be a higher burden of proof than proof beyond a reasonable doubt. However, no one really knows what it means or how to define it. Our legal system has spent hundreds of years grappling with the meaning of proof beyond a reasonable doubt. We suggest that a capital murder statute is not the place to introduce novel legal concepts if such can be avoided. None of the statutes which have been upheld by the United States Supreme Court require guilt be proved with "clear certainty"

and, therefore, it is not constitutionally necessary. Furthermore, to our knowledge at least, no other state requires proof of guilt with clear certainty.

Also abandoned is the last question contained in the current statute having to do with probability of future criminal acts of violence that would constitute a continuing threat to society. This question was drawn from the Texas statute and was very important to the decision in Jurek v. Texas in which the Texas statute was upheld. However, it was not significant because of the question on its face but because it was through this question that the Supreme Court observed that the Texas courts admitted evidence that went to the existance or not of mitigating circumstances. The Texas statute on its face, queried nothing of mitigating circumstances.

The statutes in Proffitt v. Florida, supra and Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 849(1976) have no questions concerning future criminal acts of violence. Therefore, it is not constitutionally required.

Frankly, the question immerses a capital punishment statute into a quagmire. The overwhelming quasi-scientific evidence (usually from anti-capital punishment scholars) is that it cannot be proved that one will probably commit future criminal acts of violence. Since

the question is not necessary for a constitutional capital punishment statute, it should be forever abandoned.

SECTION 8.

This section enumerates some circumstances which the jury could find as mitigating circumstances to merit leniency. Importantly, however, it does not restrict the jury from finding mitigating circumstances not enumerated -- in Lockett v. Ohio, supra the Ohio statute was ruled unconstitutional because the mitigating circumstances which could be considered were too limited.

Subsections (a) - (g) enumerate the mitigating circumstances which are contained in our current statute. There are some wording changes, however. Subsection (h) is new and concerns whether there is a likelihood that the defendant will be a danger to others in the future. Through such an inquiry, testimony of the defendant's psychological or psychiatric condition would clearly be admissible. Such testimony would frequently reveal that the defendant is afflicated with some sort of personality disorder.

SECTION 9.

This section provides as does the current statute, RCW 9A. 32. 046, that once a defendant is adjudged guilty of aggravated first degree murder and where it is found that there are not sufficient mitigating circumstances to merit leniency, then the sentence is death.

SECTION 10.

This section contains basically the same notion as the

current statute, RCW 9A. 32. 047, that when a death sentence is commuted by the governor or invalidated by a court, that the sentence is life imprisonment without release or parole. The proposal, however, is expanded to provide the alternative sentence in some situations not covered by the current law.

For example, under the current statute if a death sentence were invalidated for other than constitutional reasons, the alternative sentence would be inapplicable. Also the current statute does not cover invalidations of death sentences by courts other than the state or federal supreme courts. Thus, the current statute would not necessarily cover an invalidation through federal habeas corpus or state personal restraint petition. The proposal corrects these deficiencies.

SECTION 11.

Subsection (a): This provides for the automatic review of a death sentence. This is an important factor in any constitutional capital punishment scheme.

Subsection (b): This subsection requires the clerk of the trial court to give notice to the supreme court and the parties that a sentence of death has been imposed. It is by this notice that the automatic sentencing review is commenced.

Subsection (c): Since a verbatim report of the trial court proceedings is necessary for the supreme court to conduct its review, this subsection requires that the defendant or his attorney order these documents within ten (10) days of the entry of judgment and sentence.

Subsection (d): Once the verbatim report of proceedings is filed in the clerk's office and approved, the trial court clerk mails it and copies of all the clerk's papers to the clerk of the supreme court. The clerk of the supreme court acknowledges receipt of these documents. This is significant for it is from the date of receipt that the supreme court's time for review begins to run.

Subsection (e): This requires that the trial court judge submit a report concerning the trial, the crime, the victim, and the defendant to the supreme court. Our current statute, RCW 10.94.030, requires such a report which requirement was probably drawn from the Georgia capital murder statute. However, there is no such report in the Texas or Florida statutes.

Frankly, the report is of marginal value since the supreme court in its sentencing review will examine the entire record of the trial. The report may, however, be useful to the supreme court in focusing its attention on potential problem areas.

The form of the report contained in this proposal is largely the product of a task force which was appointed by the supreme court to develop a form under our current statute. There are, of course, modifications to accomodate this revised capital murder scheme.

If the trial judge is to make a report, it is desirable that the form of the report be statutorily specified. Although a report form was developed for use with the current statute, we do not believe that the form presently available through the supreme court has ever been approved by the court.

Subsection (f): As does the current statute, this subsection requires that any sentence review and appeal be consolidated for consideration and disposition.

Subsection (g): This is an important addition for it specifies exactly what the supreme court must do in a sentence review. Specificity is necessary so that capital cases do not get sidetracked as are the current death penalty cases now pending before the Supreme Court. It must be borne in mind that the items which the court is to consider in a sentencing review are independent of what may be considered by way of appeal.

Under subsections (g) (1) or (2) either the evidence of guilt or voluntariliness of a plea of guilty, whichever is appropriate, are considered.

Subsection (g) (3) requires that the court determine the sufficiency of evidence as to whether there were not sufficient mitigating circumstances to merit leniency.

Subsection (g) (4) requires that the court compare the sentence of death in the case before it with "similar cases", considering both the crime and the defendant. This is an important feature in a sentencing review for it will enhance uniformity in the imposition of capital punishment. Importantly, the proposal defines "similar cases". Under our current statute this was not defined and the supreme court remanded the capital cases pending before it for the gathering of data on approximately 1,000 homocide cases, most of which had dubious comparative value. The proposal defines "similar cases" as those murder cases

reported in the appellate reports since January 1, 1965 in which the death penalty was sought. This should provide sixty to seventy cases for review purposes. There should be no problem in selecting for comparison cases reported since 1965 for in Gregg v. Georgia, supra the federal supreme court allowed the use of cases which occurred prior to the passage of the capital statute there under review.

Subsection (g) (5) adds a new factor which must be considered in a sentence review, i.e. whether the death sentence was the product of passion of prejudice. As alluded to, this factor is not present in our current statutory scheme. We have added it because it seems appropriate that one not be executed as a result of a jury's passion or prejudice and because a similar factor was in Georgia's sentencing review process.

Subsection (h): This subsection specifies precisely what the supreme court is to do as a consequence of its review of a sentence of death. If the court finds a deficiency as a consequence of its sentence review, then it must invalidate the sentence and remand for re-sentencing. At the re-sentencing the defendant would get life without parole. On the other hand, if a sentence of death is affirmed, the case is remanded to the trial court for the signing of the death warrant and so forth.

Subsection (i): This subsection requires that the supreme court decide a death penalty case within one-hundred and eighty days from the time it received the report of proceedings and clerk's papers. This requirement is drawn from California Penal

Code §190.6 wherein the California supreme court must decide a capital case within one-hundred and fifty days.

A time requirement for state appellate review is desirable. Some of the capital cases presently pending before the court have been there almost three years and in none are there even briefs on the merits.

SECTION 12.

Our current statutes are in conflict as to when a death warrant is issued. This proposal makes it clear that the warrant is issued once a sentence of death is affirmed by the supreme court. As to the contents of the death warrant, the proposal draws heavily upon RCW 10.70.050.

SECTION 13.

This section deals with the confinement of a defendant after the entry of a judgment and sentence imposing the death penalty. Our current statutes are confused in regard to this issue.

Basically after a death sentence is imposed the defendant is confined in segregation at the penitentiary. Segregation is appropriate because one under sentence of death has less to lose than other prisoners. Thus, segregation in confinement should minimize the danger to others.

SECTION 14.

This section establishes a new method of execution -- by lethal injection. Presently, some controversy surrounds the infliction of death by hanging which can be avoided by

providing a new means of execution.

The proposal here is a synthesis of the statutes of Texas and Oklahoma which both provide for death by lethal injection. The Texas statute was approved in Ex Parte Granviel, 561 S.W. 2d 503 (Tex. 1978). Both the Texas and Oklahoma statutes can be found in that case.

The statute specifies the use of sodium thiopental which is a fast-acting anesthetic. The authorities we have contacted state that sodium thiopental will adequately accomplish the task but that there are a variety of other drugs equally as satisfactory. Sodium thiopental will produce unconsciousness in about fifteen seconds and death will follow painlessly. The only pain will be that associated with the prick of the needle.

Hanging is included as a fall back to lethal injection in the unlikely event that some court finds fault with the primary means of execution.

SECTION 15.

This is drawn from RCW 10.70.100 and 10.70.110 and concerns maintenance of records and return on the death warrant.

SECTION 16.

This deals with the establishment of a new execution date if, for any reason, a defendant is not executed on the appointed day. A provision such as this is necessary because in any case there are likely to be several, if not many, stays of execution from state and federal courts.

SECTION 17.

This repeals our current statutes which would no longer be needed once this proposal is enacted.

SECTION 18.

This is an emergency clause for the immediate effectiveness of this act. This is desirable since our current statutes are probably no good.

SECTION 19.

A severability clause is obviously necessary for this act.

BILL DOCUMENTS

H. B. 76 By Representatives Schmidt, Tilly, Dawson, Patrick, James, Johnson, G. A. Nelson, Struthers, Winsley, Barr, Addison, Hastings, Granlund, Walk, Owen

Revising provisions pertaining to capital punishment.

Declares that rule of lenity shall not be applied in enforcement of this legislation.

Imposes mandatory life imprisonment for first degree murder which may not be suspended or deferred.

Enumerates aggravating circumstances which constitute the crime of aggravated first degree murder. Authorizes death sentence when the trier of fact finds insufficient mitigating circumstances to merit leniency in a prescribed special sentencing proceeding. Prohibits suspension, deferral, parole, or furlough for persons serving life sentence for such crime.

Prescribes procedure to be followed by the prosecutor. Requires notice of special sentencing proceeding to be filed and served on the defendant. Prohibits plea of guilty.

Prescribes procedure to be followed in the special sentencing proceeding for jury selection, attorney's arguments, evidence, consideration of factors, and findings.

Requires mandatory review by the supreme court in addition to any appeal within prescribed time frame.

Prescribes method of execution and alternative.

--1981 REGULAR SESSION--

Jan 16 First reading, referred to Ethics, Law and Justice.

HOUSE BILL NO. 76

State of Washington
47th Legislature
1981 Regular Session

by Representatives Schmidt, Tilly, Dawson, Patrick, James, Johnson, Nelson (G), Struthers, Winsley, Barr, Addison, Hastings, Granlund, Walk, Owen

Read first time January 16, 1981, and referred to Committee on ETHICS, LAW & JUSTICE.

AN ACT Relating to capital punishment; adding a new chapter to Title 10 RCW; repealing section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess., section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing section 154, page

125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

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

NEW SECTION. Section 1. The legislature declares that the greatest freedom our citizens can have is the freedom to be secure in their persons and to live without fear of assault or death as a consequence of criminal acts. To this end it is declared that there are certain varieties of murder which are especially heinous and for which the perpetrators thereof deserve the harshest punishment which a civilized society can exact. The legislature therefore enacts this legislation to provide a sentence of death for those who commit certain particularly egregious murders to the ends that others will be deterred, that murderers receive punishment commensurate with their crimes, that there be adequate retribution for the families and friends of murder victims, and/or that the sanctity of life is enhanced by imposing the ultimate penalty on those who take life.

The legislature recognizes that no criminal justice system, consisting as it does of police, prosecutors, judges, and juries, can apply any criminal statute with mathematical precision but finds that this is no reason to forego capital punishment for those individuals who deserve it.

NEW SECTION. Sec. 2. This act shall be liberally construed to give effect to its purposes and, to this end, the rule of lenity shall have no application. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to lessen the





sanctions of any of the provisions of this act.

NEW SECTION. Sec. 3. Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of first degree murder shall be sentenced to life imprisonment, which sentence may not be suspended or deferred.

NEW SECTION. Sec. 4. A person is guilty of aggravated first degree murder when he commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement offic corrections officer, or fire fighter who was performing his official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the perpetrator to be such at the time of the killing;

(2) At the time of the act resulting in the death, the perpetrator was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the perpetrator was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The perpetrator committed the murder pursuant to an agreement that he would receive money or any other thing value for committing the murder;

(5) The defendant had solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was a judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; legislator; or elected official in the executive branch of state government and the murder was a result of legitimate duties performed or to be performed by such victim;

(7) The perpetrator committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the perpetrator;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery or attempted robbery in the first or second degree;

(b) Rape or attempted rape in the first or second degree;

(c) Burglary or attempted burglary in the first or second degree; or

(d) Kidnaping or attempted kidnaping in the first degree;

(10) The victim was regularly employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of such victim.

NEW SECTION. Sec. 5. Any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole: PROVIDED, That if, pursuant to a special sentencing proceeding held under section 7 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to





participate in any sort of release or furlough program.

NEW SECTION. Sec. 6. When a person is charged with aggravated first degree murder as defined by section 4 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

The notice of special sentencing proceeding shall be filed and served on the defendant or his attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any included offense.

Unless the notice of special sentencing proceeding is filed and served as provided in this section, the death penalty may not be sought.

NEW SECTION. Sec. 7. (1) When a defendant is adjudicated guilty of aggravated first degree murder under section 4 of this act, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 6 of this act.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury be waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney: PROVIDED, That no sort of plea, admission, or agreement shall abrogate the requirement of such special sentencing proceeding.

(3) In the event that the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding and such proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined: PROVIDED, That if unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) In the event that the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or in the event that a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge six jurors. When there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and when there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

NEW SECTION. Sec. 8. (1) At the commencement of the special sentencing proceeding the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 5 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening





statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side until the evidence in concluded. Upon conclusion of the evidence the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the usual rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the questic posed by this subsection, the jury must so find unanimously. In order to return a negative answer to the question posed by this subsection, the jury must so find with at least ten votes. If the jury after due deliberation is unable to answer the question posed by this subsection, the trial court may declare a mistrial.

NEW SECTION. Sec. 9. In deciding the question posed by section 8(4) of this act, the jury, or the court if a jury be waived, may consider any relevant factors, including but not

limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 10. When a defendant is adjudicated to be guilty of aggravated murder in the first degree and the jury answers affirmatively the question posed by section 8(4) of this act, or when a jury is waived as allowed by section 7(2) of this act and the trial court answers affirmatively the question posed by section 8(4) of this act, the defendant shall be sentenced to death and the trial court may not suspend or defer the imposition of the sentence.

NEW SECTION. Sec. 11. In the event that the governor commutes a death sentence, or that the death penalty is held to be invalid by an appellate court of the state of Washington or a federal court, or that a sentence of death imposed upon a particular defendant is held to be invalid by an appellate court of the state of Washington or a federal court, the sentence for aggravated first degree murder where there is an affirmative





response to the question posed by section 8(4) of this act shall be imprisonment in the state penitentiary for life without the possibility of release or parole.

A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any elected official may not permit such prisoner to participate in any sort of release or furlough program.

NEW SECTION. Sec. 12. Whenever a defendant is sentenced to death and upon entry of the judgment and sentence in the trial court, the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. Such notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. Such notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this act: PROVIDED, That the failure of the clerk of the trial court to provide the notice as required shall in no way prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 13. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the defendant or his attorney shall cause a verbatim report of the trial proceedings to be prepared.

(2) Within five days of the filing and approval of the

verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his attorney, and the prosecuting attorney.

NEW SECTION. Sec. 14. Within twenty days after the entry of the judgment and sentence imposing the death penalty, the trial court shall submit a report to the clerk of the supreme court of Washington, to the defendant or his attorney, and to the prosecuting attorney which shall provide the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race or ethnic origin;

(b) Number and ages of children;

(c) Whether his parents are living, including date of death where applicable;

(d) Number of children born to his parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his act; and

(iii) Able to cooperate intelligently with his defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;





(h) The prior work record of the defendant;

(i) A list of defendants prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and whether these co-defendant(s) were convicted.

(3) Information concerning special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencir proceeding was the same jury that returned the guilty verdict, providing an explanation if it is not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 9 of this act;

(e) Whether the jury was unanimously convinced beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.

(4) Information about the victim, including:

(a) Whether he was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) Length of time victim resided in Washington and the county;

(e) Whether the victim was the same race or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of physical harm or torture inflicted upon the victim;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) Length of time counsel has practiced law and nature of practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether race and/or ethnic origin was raised as an issue at trial;

(b) What percentage of the county population is the same race or ethnic origin of the defendant;

(c) Whether members of the defendant's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were





systematically excluded from the jury;

(e) Whether there was mention during the trial that the defendant had an unusual sexual preference such as homosexuality;

(f) Any specific instruction to the jury to exclude race, ethnic origin, or sexual preference as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Death penalty imposed;

(g) Trial judge's report completed; and

(h) Trial judge's report filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

NEW SECTION. Sec. 15. (1) The sentence review required by section 12 of this act shall be in addition to any appeal. Such review and appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs

within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to support a verdict or finding of guilt to aggravated first degree murder; or

(b) Whether the plea of guilty to aggravated first degree murder was knowingly, intelligently, and voluntarily made; and

(c) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 8(4) of this act; and

(d) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection "similar cases" shall mean cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the trier of fact considered the imposition of capital punishment regardless of whether it was imposed or executed; and

(e) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 16. Unless the procedures specified in subsections (1) and (2) of this section would be nugatory as a consequence of relief afforded a defendant through an appeal, the following shall occur upon completion of a sentence review:

(1) The court shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 11 of this act if:

(a) The court makes a negative determination as to any of the questions posed by sections 15(2)(a), (b), and (c) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 15(2)(d) or (e) of this





act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 18 of this act if:

(a) The court makes an affirmative determination as to the questions posed by section 15(2)(a) or (b) and (c) of this act; or

(b) The court makes a negative determination as to the questions posed by section 15(2)(d) and (e).

NEW SECTION. Sec. 17. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one hundred and eighty days of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers as provided by section 13 of this act. In any case in which this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 18. When a death sentence is affirmed and the case remanded to the trial court as provided in section 16 (2) of this act, a death warrant shall forthwith be issued t the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 19. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in section 18 of this act. During such period of imprisonment the defendant shall be confined in segregation from other prisoners not under sentence of death and the superintendent of the penitentiary may not suffer or permit any person to visit, converse, or communicate with the defendant except the attendants of the penitentiary, legal, spiritual, and medical advisers, and the members of the defendant's immediate family.

NEW SECTION. Sec. 20. (1) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary.

(2) In the event that the execution of the sentence of death as provided by subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be inflicted by hanging by the neck which shall be supervised by the superintendent of the penitentiary.

(3) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 21. (1) The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return





thereon showing all acts and proceedings done by him thereunder.

NEW SECTION. Sec. 22. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 18 of this act.

NEW SECTION. Sec. 23. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 24. Sections 1 through 23 of this act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 25. The following acts or parts of acts are each repealed:

(1) Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess., section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040;

(2) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(3) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(4) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047;

(5) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(6) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(7) Section 152, page 125, Laws of 1854, section 291,

page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(8) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(9) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(10) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(11) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(12) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(13) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(14) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(15) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(16) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(17) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(18) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and

(19) Section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900.

NEW SECTION. Sec. 26. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

# APPENDIX 16

IN THE LEGISLATURE
of the
# STATE OF WASHINGTON

## CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE HOUSE BILL NO. 76

CHAPTER NO. _____

*Passed the House* March 18, 1981
as amended
*Yeas* 67 *Nays* 29

*Passed the Senate* April 21, 1981
as amended
*Yeas* 33 *Nays* 15

4-23-81 The House concurred in the Senate amendments except on page 5, line 11. The House asked the Senate to recede therefrom.

4-26-81 The Senate receded from page 5, line 11 and passed the bill with the remaining amendments.
Yeas 30 Nays 16

4-26-81 The House passed the bill without Senate amendment to page 5, line 11.
Yeas 70 Nays 28

### CERTIFICATION

*I, Vito T. Chiechi, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is enrolled Substitute House Bill No. 76 as passed by the House of Representatives and the Senate on the dates hereon set forth.*

Vito T. Chiechi
*Vito T. Chiechi* *Chief Clerk*

SUBSTITUTE HOUSE BILL NO. 76

State of Washington
47th Legislature
1981 Regular Session

by Committee on Ethics, Law & Justice (originally sponsored by Representatives Schmidt, Tilly, Dawson, Patrick, James, Johnson Nelson (G), Struthers, Winsley, Barr, Addison, Hastings, Granlund, Walk, Owen)

Read first time March 4, 1981, and passed to Rules for second reading.
April 26, 1981: Passed as amended by the Senate.

AN ACT Relating to capital punishment; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; adding a new chapter to Title 10 RCW; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing

section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

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

NEW SECTION. Section 1. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

NEW SECTION. Sec. 2. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;





(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

NEW SECTION. Sec. 3. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any

judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 5 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

NEW SECTION. Sec. 4. (1) If a person is charged with aggravated first degree murder as defined by section 2 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 5. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance





of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 4 of this act. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the

prosecution shall be allowed a like number of additional challenges.

NEW SECTION. Sec. 6. (1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 3 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not





sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 7. In deciding the question posed by section 6(4) of this act, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 8. (1) If a jury answers affirmatively the question posed by section 6(4) of this act, or when a jury is waived as allowed by section 5(2) of this act and the trial court answers affirmatively the question posed by section 6(4) of this act, the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to

the question posed in section 6(4) of this act, the defendant shall be sentenced to life imprisonment as provided in section 3(1) of this act.

NEW SECTION. Sec. 9. If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by section 6(4) of this act shall be life imprisonment as provided in section 3(1) of this act.

NEW SECTION. Sec. 10. Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 11. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a





verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

NEW SECTION. Sec. 12. In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 7 of this act;





(e) The jury's answer to the question posed in section 6(4) of this act;

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same

race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.





NEW SECTION. Sec. 13. (1) The sentence review required by section 10 of this act shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 6(4) of this act; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under section 12 of this act; and

(c) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 14. Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 9 of this act if:

(a) The court makes a negative determination as to the question posed by section 13(2)(a) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 13(2)(b) or (c) of this act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 16 of this act if:

(a) The court makes an affirmative determination as to the question posed by section 13(2)(a) of this act; and

(b) The court makes a negative determination as to the question posed by section 13(2)(b) and (c) of this act.

NEW SECTION. Sec. 15. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under section 11 of this act. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 16. If a death sentence is affirmed and the case remanded to the trial court as provided in section 14(2) of this act, a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 17. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance





of the death warrant as provided in section 16 of this act. During such period of imprisonment, the defendant shall be confined in segregation from other prisoners not under sentence of death.

NEW SECTION. Sec. 18. (1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted either by hanging by the neck until death is pronounced by a licensed physician or, 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.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 19. (1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

NEW SECTION. Sec. 20. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 16 of this act.

Sec. 21. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((as follows:

(1)--If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to RCW 10.94.020(10), the sentence shall be death;

(2)--If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to RCW 10.94.020(10), the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3)--In all other convictions for first degree murder, the sentence shall be life imprisonment)) to life imprisonment.

NEW SECTION. Sec. 22. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 23. Sections 1 through 20 of this act shall constitute a new chapter in Title 10 RCW.





NEW SECTION. Sec. 24. The following acts or parts of acts are each repealed:

(1) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(2) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(3) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047;

(4) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(5) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(6) Section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(7) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(8) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(9) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(10) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(11) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(12) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(13) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(14) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(15) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(16) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(17) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and

(18) Section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900.

NEW SECTION. Sec. 25. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House April 26, 1981.

Speaker of the House.

Passed the Senate April 26, 1981.

President of the Senate.

office of program research

WASHINGTON STATE HOUSE OF REPRESENTATIVES
ROOM 202, HOUSE OFFICE BUILDING, OLYMPIA, WA 98504, (206) 753-0520

February 3, 1981

M E M O R A N D U M

TO: MEMBERS, HOUSE ETHICS, LAW & JUSTICE COMMITTEE

FROM: BILL PERRY, STAFF COUNSEL BP
HOUSE ETHICS, LAW & JUSTICE COMMITTEE

SUBJECT: POSSIBLE TECHNICAL PROBLEMS WITH HOUSE BILL 76 AND THE PROPOSED AMENDMENTS

What follows is a list of possible technical problems with House Bill 76 and the proposed amendments. These are "drafting" considerations and dealing with them should not affect the substance of the bill. A couple, however, do raise potentially serious constitutional problems which should be addressed.

(1) On page 1, line 1, the title of the bill is "AN ACT Relating to capital punishment." Section 3 of the bill, on the other hand, provides for a sentence of "life imprisonment" for first degree murder. This section may violate Article 2, Section 19 of the state constitution which requires that "No bill shall embrace more than one subject, and that shall be expressed in the title."

The subject matter of section 3 is certainly closely enough related to the rest of HB 76 to pass the "one subject" requirement of Article 2, Section 19 (see, e.g., State V. Waggoner, 80 Wn2d 7, 9 (1971)). However, section 3 may violate the "title" requirement of that constitutional provision. The title requirement has been liberally construed to require only that the title reasonably lead to an inquiry into the bill's contents (Treffy v. Taylor, 67 Wn2d 487, 491 (1965)). Nonetheless, section 3 is the only substantive portion of the bill dealing with a subject completely separate from the death penalty. Other sections of the bill may deal with life imprisonment, but these sections still relate to "aggravated first degree murder," and the punishment of life imprisonment is in effect an alternative to capital punishment. Section 3 pertains to crimes for which the death penalty could never be imposed.

Criminal laws generally, and capital punishment law in particular, get close judicial scrutiny and are subject to strict interpretation. Therefore, it would seem advisable either to drop section 3 from the bill, or to change the bill's title to something more inclusive such as "AN ACT Relating to murder."

(2) In two places, HB 76 purports to affect sections of existing law without amending those sections in the bill itself.

On page 2, line 34, RCW 2.04.200 is referred to, but not amended. RCW 2.04.200 provides that all laws in conflict with a court rule "shall be and become of no further force or effect." Section 2 of HB 76, on the other hand, declares that no rule of the court shall lessen the sanctions of the statute (HB 76). Obviously, section 2 of HB 76 is attempting to amend RCW 2.04.200 by carving out an exception for the capital punishment law.

Article 2, Section 37 of the state constitution requires "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." This constitutional provision has been used in recent years to invalidate legislation which purports to amend existing law without doing so explicitly (see, e.g., Weyerhauser v. King County, 91 Wn2d 721 (1979)). This potential defect in HB 76 could easily be cured by including, and amending, RCW 2.04.200 as a section in the bill. (Note: this discussion ignores the possibility that the supreme court may well view a particular rule as flowing from the courts' "inherent power" anyway, and therefore not dependent on RCW 2.04.200 and consequently not subject to section 2 of HB 76.)

The same Article 2, Section 37 question arises with respect to section 3 of the bill. That section purports to amend RCW 9A.32-.030(2), but does so by reference only. Thus, a person reading RCW 9A.32.030(2) would think the penalty for first degree murder was one thing, while HB 76 would have made it something else. It is true that current law does much the same thing -- i.e., RCW 9A-.32.040(3) implicitly "amends" 9A.32.030(2). However, those two existing sections are at least found next to each other in the same RCW title and chapter. HB 76 will create a new chapter in title 10 RCW. At any rate, it would seem prudent to set out RCW 9A.32.030(2) at length in HB 76 and amend it to reflect the changes made by the bill.

(3) On page 15, line 7, "or" should probably be "and." Section 16(2) of HB 76 deals with circumstances under which the supreme court affirms a death sentence upon review. (Note: this section should probably explicitly say "supreme court" at least once to avoid any possible confusion between "court" and "superior court.") As written, HB 76 would appear to authorize the death penalty despite a finding under section 15(2)(e), for instance, that the "sentence of death was brought about through passion or prejudice." A literal reading of the section would allow this result so long as the questions asked in section 15(2)(a)(b) and (c) were answered in the affirmative.

(4) The proposed amendment on page 14, line 5 requires the relettering of subsections of section 15(2) of HB 76. Section 16 of the

bill, however, contains internal references to that same section 15(2). Those internal references would be inappropriate if the amendment were adopted. If the amendment is adopted, further amendments should be made on page 14, lines 32 and 35 and page 15, lines 6 and 9 in order to reletter the subsection references in section 16.

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February 3, 1981

M E M O R A N D U M

TO: MEMBERS, HOUSE ETHICS, LAW & JUSTICE COMMITTEE

FROM: PETER CUTLER, LEGAL INTERN
HOUSE ETHICS, LAW & JUSTICE COMMITTEE pc

SUBJECT: ANALYSIS OF HOUSE BILL 76
DEATH PENALTY: CONSTITUTIONAL ISSUES

INTRODUCTION - BACKGROUND INFORMATION ON CONSTITUTIONAL ISSUES:

In 1972, the U.S. Supreme Court ruled that capital punishment violates the Eighth Amendment prohibition against "cruel and unusual punishment" when a jury is given complete discretion whether or not to sentence a person to death. In Furman v. Georgia, the court said:

> "The death penalty cannot be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner.... These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual...."

In more recent cases, however, the U.S. Supreme Court has upheld some statutes and struck others down. In most of these cases, the critical issues involved sentencing procedures. In the process, the court has not articulated clear guidelines for legislators, but instead has focused on whether the specific features of a given sentencing procedure protect against the danger of arbitrary infliction of the death penalty. Among the features the court has cited with approval are:

(1) requiring the jury to find at least one specific "aggravating circumstance" from a list given in the death penalty statute;

(2) requiring the jury to consider all relevant evidence, including hearsay, regarding the defendant and the crime -- especially evidence which might show the presence of mitigating factors;

(3) requiring the jury to consider the possible existence of mitigating factors; and

(4) requiring automatic review of all death sentences.

Death as punishment is unique in its severity and irrevocability. For this reason, the Supreme Court stresses that the procedures used in sentencing "must insure that every safegard is observed...." (Gregg v. Georgia.) House Bill 76, like Washington's current death penalty law, contains most of the features which have been found in statutes upheld by the United State Supreme Court. The current statute is being considered by the Washington Supreme Court. Among the issues to be decided by the court are whether the current statute is too restrictive of jury discretion and whether death by hanging is cruel and unusual punishment.

HOUSE BILL 76 - WHAT IT DOES.

House Bill 76 revises the current statutes relating to capital punishment. It establishes the crime of aggravated first-degree murder for murders committed under certain aggravated circumstances, such as the murders of policemen, judges, legislators, and other officials, murder for hire, and murders committed in the course of various felonies, etc.

House Bill 76 authorizes imposition of the death sentence for persons convicted of aggravated first-degree murder when a jury in a special sentencing proceeding decides that there are "not sufficient mitigating circumstances to merit leniency."

The bill sets up the procedure to be followed in the special sentencing proceeding, i.e., what factors should be considered, what evidence is admissible, etc.

It requires mandatory review of all death sentences by the Supreme Court within 180 days and prescribes a new method of execution -- intravenous injection instead of hanging.

HOUSE BILL 76 - THE MAJOR CHANGES IT MAKES IN PRESENT LAW.

House Bill 76 would make several major changes, as well as many smaller changes, in Washington's present death penalty law:

(1) It establishes a procedure for impaneling a sentencing jury when the defendant pleads guilty or is tried without a jury. This change responds to State v. Martin, 94 Wn2d 1 (1980), and fills the gap in the current law which prevents the prosecutor from seeking the death penalty in cases where the defendant pleads guilty. (See section 7, page 6, lines 10-28.)

(2) It provides for new "rules of construction" which the courts must use in construing the statute and applying it to a given case. Section 2 of the bill calls for liberal construction of the act, a suspension of the rule of lenity and a supercession of court rules.

This provision may be of questionable effect. It attempts to reverse the universal rule that criminal statutes have to be strictly construed, and is probably inconsistent with the rule that a defendant in a capital case has the right to every possible procedural protection. It also may impinge upon the courts "inherent" rule-making authority. (See section 2, page 2, lines 30-34.)

(3) It substantially changes the question which the jury must answer before the sentence of death can be imposed. The current law requires the jury to unanimously affirm both that the defendant's guilt has been established with "clear certainty" and that there was a probability that the defendant would commit additional criminal acts of violence. House Bill 76 only requires that the jury find "that there are not sufficient mitigating circumstances to merit leniency...."

(4) House Bill 76 also states that unless at least ten of the jurors agree that there are sufficient mitigating circumstances that the trial court has the option of declaring a mistrial. This is a significant change from the present law in which the defendant can only be sentenced to life imprisonment where the original sentencing jury unanimously agrees that the death sentence is called for. (See section 8, page 7, lines 20-32.)

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PROPOSED SUBSTITUTE SENATE BILL 3096

AN ACT Relating to capital punishment; adding a new chapter to Title 10 RCW; repealing section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess., section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing section 154, page

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125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

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

NEW SECTION. Section 1. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective,

current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; legislator; or an official in the executive branch of state government; and

(b) The murder was related to the exercise of duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

NEW SECTION. Sec. 2. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive

official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 4 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

NEW SECTION. Sec. 3. (1) If a person is charged with aggravated first degree murder as defined by section 1 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed if the defendant is found guilty.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or his or her attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends the period for filing and service of the notice.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 4. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 3 of this act. No sort of plea, admission, or agreement shall abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury be waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall

commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or in the event that a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The jury shall be impaneled and challenges allowed as provided in the criminal rules for superior court.

NEW SECTION. Sec. 5. (1) At the commencement of the special sentencing proceeding the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 2 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. Evidence secured in

violation of the Constitution of the United States or the state of Washington shall not be admissible.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury was impaneled under section 4(4) of this act, both the defense and prosecution may also introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" To return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 6. In deciding whether there are sufficient mitigating circumstances to merit leniency, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has no significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the

violation of the Constitution of the United States or the state of Washington shall not be admissible.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury was impaneled under section 4(4) of this act, both the defense and prosecution may also introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" To return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 6. In deciding whether there are sufficient mitigating circumstances to merit leniency, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has no significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 7. (1) If a jury answers affirmatively the question posed by section 5(4) of this act, or when a jury is waived as allowed by section 4(2) of this act and the trial court answers affirmatively the question posed by section 5(4) of this act, the defendant shall be sentenced to death. The trial court may not suspend or defer the imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in section 5(4) of this act, the defendant shall be sentenced to life imprisonment as provided in section 2(1) of this act.

NEW SECTION. Sec. 8. If the governor commutes a death sentence, the death penalty is held to be invalid by an appellate court of the state of Washington or a federal court, or a sentence of death imposed upon a particular defendant is held to be invalid by an appellate court of the state of Washington or a federal court, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by section 5(4) of this act shall be life imprisonment as provided in section 2(1) of this act.

NEW SECTION. Sec. 9. Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence,

and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this act. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 10. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause a verbatim transcript of the trial proceedings to be prepared.

(2) Within five days of receiving the transcript, the clerk of the trial court shall transmit the transcript together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

NEW SECTION. Sec. 11. In all cases in which a person is convicted of aggravated first degree murder the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of

death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning special sentencing proceeding, including:

(a) The date the defendant was convicted and date the

special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 6 of this act;

(e) The jury's answer to the question posed in section 5(4) of this act;

(f) The sentence imposed.

(g) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

NEW SECTION. Sec. 12. (1) The sentence review required by section 9 of this act shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 5(4) of this act; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection "similar cases" shall mean cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the trier of fact considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under section 11 of this act; and

(c) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 13. Upon completion of a sentence review:

(1) The court shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 8 of this act if:

(a) The court makes a negative determination as to any of the questions posed by section 12(2)(a) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 12(2)(b) or (c) of this act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 15 of this act if:

(a) The court makes an affirmative determination as to the questions posed by section 12(2)(a) of this act; and

(b) The court makes a negative determination as to the questions posed by section 12(2)(b) and (c) of this act.

NEW SECTION. Sec. 14. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one hundred and eighty days of receipt by the clerk of the supreme court of Washington of the verbatim transcript of proceedings and clerk's papers filed under section 10 of this act. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 15. If a death sentence is affirmed and the case remanded to the trial court as provided in section 13(2) of this act, a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the

superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 16. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in section 15 of this act. During such period of imprisonment the defendant shall be confined in segregation from other prisoners not under sentence of death and the superintendent of the penitentiary may not suffer or permit any person to visit, converse, or communicate with the defendant except the attendants of the penitentiary, legal, spiritual, and medical advisers, and the members of the defendant's immediate family.

NEW SECTION. Sec. 17. (1) The sentence of death shall be inflicted by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 18. (1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

NEW SECTION. Sec. 19. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 15 of this act.

NEW SECTION. Sec. 20. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 21. Sections 1 through 20 of this act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 22. The following acts or parts of acts are each repealed:

(1) Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess., section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040;

(2) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(3) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(4) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047;

(5) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(6) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(7) Section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873,

section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(8) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(9) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(10) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(11) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(12) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(13) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(14) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(15) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(16) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(17) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(18) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and

(19) Section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900.

NEW SECTION. Sec. 23. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

HOUSE OF REPRESENTATIVES
STATE OF WASHINGTON

# BILL REPORT

(as passed by committee)

1981 REGULAR session

Bill No.: HB 76

Companion Measure:
Original:
Amended:
Substitute: XXXXXX

Date: 3/2/81
Staff: Bill Perry
Phone: 753-4826

BRIEF TITLE: (from Status of Bills)
Capital Punishment

SPONSOR(S): (note if agency; committee; executive request)
(see reverse)

| Reported by Committee on: | Recommendation: | Roll Call Vote: | FISCAL NOTE INFORMATION | | | |
|---|---|---|---|---|---|---|
| Eth. Law & Justice (14) | DPS (9) | 9 Y 5 N | Prepared: | Attached: | Requested: | N/A |

Majority Report signed by:
ELLIS, Padden, Bickham, Granlund, Patrick, Schmidt, Tilly, Tupper, Winsley

Minority Report signed by: (if requested)

ANALYSIS: (background / summary / effect of amendments or substitute, as applicable)

BACKGROUND: Washington's current death penalty law is before the state supreme court pending a decision on its constitutionality. In a case already decided, State v. Martin, 94 Wn2d 1 (1980), the court held that the current law prohibits the imposition of the death penalty in cases where the defendant has plead guilty.

The current death penalty law requires a sentencing jury to answer affirmatively two questions before the death penalty may be imposed. Those questions are whether guilt has been established with "clear certainty," and whether there is probability beyond a reasonable doubt that the defendant would commit additional criminal acts of violence.

Current law also establishes a number of "aggravating cricumstances," of which at least one must be present to turn a first-degree murder into a capital offense. Among those aggravating circumstances are the murders of judges, jurors, witnesses, prosecutors or defense attorneys who are murdered because of official duties performed in relation to the defendant.

SUMMARY: Substitute House Bill 76 makes various technical and organizational changes in the death penalty law. It also corrects defects identified in State v. Martin, and makes other changes in the current law.

XX continued on reverse

Arguments presented for: The people have demonstrated their desire to have a death penalty. An effective workable death penalty law is an appropriate response to particularly heinous murders and will act as a deterrent. The bill contains

XX continued on reverse

Arguments presented against: It is morally wrong for the state to execute people. Mistakes can be made. Studies indicate no deterrent effect of death penalties. Life imprisonment without possibility of parole is an appropriate sentence for the worst offenders.

XX continued on reverse

Principal proponents:
Ron Franz,
Washington Assoc. of Prosecuting Attorneys

Principal opponents:
Tim Ford
ACLU
Amnesty International

Attachments: Committee Roll Call Vote Sheet



Rep C 106

EFFECT OF SUBSTITUTE (cont'd):

(6) Requiring that if the sentencing jury fails to unanimously find for the death penalty, then punishment shall be life imprisonment without possibility of parole as under current law rather than allowing sentencing retrial when less than ten jurors find against the death penalty; and

(7) Explicitly allowing the defendant as well as the prosecution to offer and rebut hearsay evidence during the sentencing trial.

# HOUSE OF REPRESENTATIVES

## ROLL CALL VOTE

BILL NO. 76

DATE: 3-2-81

Committee on ETHICS, LAW & JUSTICE (14)

VOTING ON:

Final Passage DPS
(DP, DPA, DPS, DP2S)

| MEMBER | AYE | NAY | ABSENT = A EXCUSED = E | NOT VOTING | CHANGE VOTE |
|---|---|---|---|---|---|
| Becker | | ✓ | | | |
| Bickham | ✓ | | | | |
| Ellis | ✓ | | | | |
| Granlund | ✓ | | | | |
| Gruger | | ✓ | | | |
| Padden | ✓ | | | | |
| Patrick | ✓ | | | | |
| Pruitt | | ✓ | | | |
| Salatino | | ✓ | | | |
| Schmidt | ✓ | | | | |
| Tilly | ✓ | | | | |
| Tupper | ✓ | | | | |
| Wang | | ✓ | | | |
| Winsley | ✓ | | | | |
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| TOTAL | 9 | 5 | | | |
| Change Vote | — | — | | | |
| TOTAL | 9 | 5 | | | |

Rep H 106

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

March 2, 1981
(date)

HOUSE BILL No. 76
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* Representative Schmidt

Revising provisions pertaining to capital punishment.
(Type in brief title exactly as it appears on back cover of original bill)

*reported by Committee on* ETHICS, LAW & JUSTICE (14)

☐ *MAJORITY recommendation: Do Pass.*

☒ *MAJORITY recommendation: The substitute bill be substituted therefor and the substitute bill do pass.*

☐ *MAJORITY recommendation: Do pass with the following amendment(s):*

*Signed by*
*Representatives*

Ellis — *Chairman*

Padden — *Vice Chairman*

[redacted] — Ranking Minority Member

[redacted]

Bickham

Granlund

[redacted]

Patrick

[redacted]

Schmidt

Tilly

Tupper

[redacted]

Winsley

ATTACHMENT: Committee Roll Call Vote

☐ Check here if Minority Report Requested (see back)

Rep D -10b-

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

_____ (date)

_____ No. _____
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* _____

_____
(Type in brief title exactly as it appears on back cover of original bill)

_____

*reported by Committee on* ETHICS, LAW & JUSTICE (14)

*MINORITY recommendation:*

*Signed by*

*Representatives*

| | | | |
|---|---|---|---|
| Ellis | *Chairman* | Patrick | |
| Padden | *Vice Chairman* | Pruitt | |
| Salatino | Ranking Minority Member | Schmidt | |
| Becker | | Tilly | |
| Bickham | | Tupper | |
| Granlund | | Wang | |
| Gruger | | Winsley | |
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SUBSTITUTE
HOUSE BILL NO. 76

BY

Committee on Ethics, Law & Justice
(Originally Sponsored By: Schmidt, Tilly, Dawson, Patrick, James, Johnson, Nelson (G), Struthers, Winsley, Barr, Addison, Hastings, Granlund, ~~BROOKOVER~~ Walk and Owen

BRIEF TITLE

Revising provisions pertaining to capital punishment.

HOUSE RECORD—

*Filed by Committee and ordered printed*

*On motion Substituted for Original Bill, placed on calendar*

*Read second time and*

*Read third time and*

*Yeas, Nays*
*Title Agree to*
*Sent to Senate*

*Chief Clerk.*

SENATE RECORD—

*Received from House*
*Read first time and referred to Committee on*
*Reported back by Committee with the recommendation*
*MAJORITY do pass*
*MAJORITY do pass as amended*
*MINORITY do not pass*
*That Substitute House Bill be substituted therefor and that Substitute Bill Do Pass*
*Passed to second reading.*

*Read second time and*

*Read third time and*

*Yeas, Nays*
*Title Agreed to*
*Returned to House*

*Secretary of the Senate.*

*Receiv*

*Enrolled*
*Signed, Sp*
*Signed, Pres*
*Signe*

HOUSE RECORD—

*and placed in Commit*
*third reading*

*Committee with the rec*
*MAJORITY do pass*
*MAJORITY do pass as*
*MINORITY do not pass*
*That Substitute House*
*be substituted therefor a*
*Bill Do Pass*
*Passed to second readin*

*Re*

*Yeas*

AN ACT Relating to capital punishment; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; adding a new chapter to Title 10 RCW; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing

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section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

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

NEW SECTION. Section 1. The legislature declares that the greatest freedom our citizens can have is the freedom to be secure in their persons and to live without fear of assault or death as a consequence of criminal acts. To this end it is declared that there are certain varieties of murder which are especially heinous and for which the perpetrators thereof deserve the harshest punishment which a civilized society can exact. The legislature therefore enacts this chapter to provide a sentence of death for those who commit certain enumerated murders to the ends that others will be deterred, that murderers receive punishment commensurate with their crimes, that there be adequate retribution for the families and friends of murder victims, and/or that the sanctity of life is enhanced by imposing the ultimate penalty on those who take life.

NEW SECTION. Sec. 2. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

NEW SECTION. Sec. 3. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or

her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

NEW SECTION. Sec. 4. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 6 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

NEW SECTION. Sec. 5. (1) If a person is charged with aggravated first degree murder as defined by section 3 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for

good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 6. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 5 of this act. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is

necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

NEW SECTION. Sec. 7. (1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 4 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be

accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 8. In deciding the question posed by section 7(4) of this act, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of

law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 9. (1) If a jury answers affirmatively the question posed by section 7(4) of this act, or when a jury is waived as allowed by section 6(2) of this act and the trial court answers affirmatively the question posed by section 7(4) of this act, the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury fails to return an affirmative answer to the question posed in section 7(4) of this act, the defendant shall be sentenced to life imprisonment as provided in section 4(1) of this act.

NEW SECTION. Sec. 10. If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by section 7(4) of this act shall be life imprisonment as provided in section 4(1) of this act.

NEW SECTION. Sec. 11. Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of

Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 12. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

NEW SECTION. Sec. 13. In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the

following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 8 of this act;

(e) The jury's answer to the question posed in section 7(4) of this act;

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime,

defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

NEW SECTION. Sec. 14. (1) The sentence review required by section 11 of this act shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 7(4) of this act; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under section 13 of this act; and

(c) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 15. Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 10 of this act if:

(a) The court makes a negative determination as to the question posed by section 14(2)(a) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 14(2)(b) or (c) of this act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 17 of this act if:

(a) The court makes an affirmative determination as to the question posed by section 14(2)(a) of this act; and

(b) The court makes a negative determination as to the question posed by section 14(2)(b) and (c) of this act.

NEW SECTION. Sec. 16. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under section 12 of this act. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 17. If a death sentence is affirmed and the case remanded to the trial court as provided in section 15(2) of this act, a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the

seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 18. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in section 17 of this act. During such period of imprisonment, the defendant shall be confined in segregation from other prisoners not under sentence of death and the superintendent of the penitentiary shall not suffer or permit any person to visit, converse, or communicate with the defendant except the attendants of the penitentiary, legal, spiritual, and medical advisers, and the members of the defendant's immediate family.

NEW SECTION. Sec. 19. (1) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary. The superintendent of the penitentiary may establish procedures whereby the sentence of death is carried out by two or more persons under circumstances making it impossible to determine actual personal responsibility for the execution of the sentence.

(2) If the execution of the sentence of death as provided by subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be executed by hanging by the neck, which shall be supervised by the

superintendent of the penitentiary.

(3) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 20. (1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

NEW SECTION. Sec. 21. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 17 of this act.

Sec. 22. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((as follows:

~~((1)--If,-pursuant-to-a-special-sentencing-proceeding-held under-RCW-10.94.020,-the-jury-finds-that-there-are-one--or--more aggravating--circumstances--and--that--there--are-not-sufficient mitigating--circumstances--to--merit--leniency,--and--makes---an affirmative--finding--on-both-of-the-special-questions-submitted to-the-jury-pursuant-to-RCW-10.94.020((,))-the-sentence-shall-be death;~~

~~(2)--If,-pursuant-to-a-special-sentencing-proceeding-held under-RCW-10.94.020,-the-jury-finds-that-there-are-one--or--more aggravating--circumstances--but-fails-to-find-that-there-are-not sufficient-mitigating-circumstances-to-merit--leniency,--or--the jury--answers--in--the--negative-either-of-the-special-questions submitted-pursuant-to-RCW-10.94.020(10),-the-sentence--shall--be life--imprisonment--without-possibility-of-release-or-parole.--A person-sentenced-to--life--imprisonment--under--this--subsection shall-not-have-that-sentence-suspended,-deferred,-or-commuted-by any--judicial-officer,-and-the-board-of-prison-terms-and-paroles shall--never--parole--a--prisoner--nor--reduce--the--period---of confinement.---The--convicted--person-shall-not-be-released-as-a result-of-any-type--of--good--time--calculation--nor--shall--the department--of--social--and-health-services-permit-the-convicted person-to-participate--in--any--temporary--release--or--furlough program;-and~~

~~(3)---in--all--other-convictions-for-first-degree-murder, the-sentence-shall-be-life-imprisonment))~~ to life imprisonment.

NEW SECTION. Sec. 23. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 24. Sections 1 through 21 of this act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 25. The following acts or parts of acts are each repealed:

(1) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(2) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(3) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW

9A.32.047;

(4) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(5) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(6) Section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(7) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(8) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(9) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(10) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(11) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(12) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(13) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(14) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(15) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(16) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(17) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and

(18) Section 10, chapter 206, Laws of 1977 ex. sess. and

RCW 10.94.900.

NEW SECTION. Sec. 26. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

SUBSTITUTE HOUSE BILL NO. 76

State of Washington
47th Legislature
1981 Regular Session

by Committee on Ethics, Law & Justice (originally sponsored by Representatives Schmidt, Tilly, Dawson, Patrick, James, Johnson, Nelson (G), Struthers, Winsley, Barr, Addison, Hastings, Granlund, Walk and Owen)

Read first time March 4, 1981, and passed to Rules for second reading.

AN ACT Relating to capital punishment; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; adding a new chapter to Title 10 RCW; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing

section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

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

NEW SECTION. Section 1. The legislature declares that the greatest freedom our citizens can have is the freedom to be secure in their persons and to live without fear of assault or death as a consequence of criminal acts. To this end it is declared that there are certain varieties of murder which are especially heinous and for which the perpetrators thereof deserve the harshest punishment which a civilized society can exact. The legislature therefore enacts this chapter to provide a sentence of death for those who commit certain enumerated murders to the ends that others will be deterred, that murderers receive punishment commensurate with their crimes, that there be adequate retribution for the families and friends of murder victims, and/or that the sanctity of life is enhanced by imposing the ultimate penalty on those who take life.

NEW SECTION. Sec. 2. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

NEW SECTION. Sec. 3. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or





her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

NEW SECTION. Sec. 4. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 6 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

NEW SECTION. Sec. 5. (1) If a person is charged with aggravated first degree murder as defined by section 3 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for





good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 6. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 5 of this act. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is

necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

NEW SECTION. Sec. 7. (1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 4 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be





accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 8. In deciding the question posed by section 7(4) of this act, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of

law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 9. (1) If a jury answers affirmatively the question posed by section 7(4) of this act, or when a jury is waived as allowed by section 6(2) of this act and the trial court answers affirmatively the question posed by section 7(4) of this act, the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury fails to return an affirmative answer to the question posed in section 7(4) of this act, the defendant shall be sentenced to life imprisonment as provided in section 4(1) of this act.

NEW SECTION. Sec. 10. If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by section 7(4) of this act shall be life imprisonment as provided in section 4(1) of this act.

NEW SECTION. Sec. 11. Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of





Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 12. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

NEW SECTION. Sec. 13. In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the

following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and





(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 8 of this act;

(e) The jury's answer to the question posed in section 7(4) of this act;

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;

(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime,





defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

NEW SECTION. Sec. 14. (1) The sentence review required by section 11 of this act shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 7(4) of this act; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under section 13 of this act; and

(c) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 15. Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 10 of this act if:

(a) The court makes a negative determination as to the question posed by section 14(2)(a) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 14(2)(b) or (c) of this act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 17 of this act if:

(a) The court makes an affirmative determination as to the question posed by section 14(2)(a) of this act; and

(b) The court makes a negative determination as to the question posed by section 14(2)(b) and (c) of this act.

NEW SECTION. Sec. 16. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under section 12 of this act. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 17. If a death sentence is affirmed and the case remanded to the trial court as provided in section 15(2) of this act, a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the





seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 18. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in section 17 of this act. During such period of imprisonment, the defendant shall be confined in segregation from other prisoners not under sentence of death and the superintendent of the penitentiary shall not suffer or permit any person to visit, converse, or communicate with the defendant except the attendants of the penitentiary, legal, spiritual, and medical advisers, and the members of the defendant's immediate family.

NEW SECTION. Sec. 19. (1) The sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician. The procedure to be utilized at such execution shall be determined and supervised by the superintendent of the penitentiary. The superintendent of the penitentiary may establish procedures whereby the sentence of death is carried out by two or more persons under circumstances making it impossible to determine actual personal responsibility for the execution of the sentence.

(2) If the execution of the sentence of death as provided by subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be executed by hanging by the neck, which shall be supervised by the

superintendent of the penitentiary.

(3) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 20. (1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

NEW SECTION. Sec. 21. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 17 of this act.

Sec. 22. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((as follows:

(1) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to RCW 10.94.020(10), the sentence shall be death;





(2) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to RCW 10.94.020(10), the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment)) to life imprisonment.

NEW SECTION. Sec. 23. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 24. Sections 1 through 21 of this act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 25. The following acts or parts of acts are each repealed:

(1) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(2) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(3) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW

9A.32.047;

(4) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(5) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(6) Section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(7) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(8) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(9) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(10) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(11) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(12) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(13) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(14) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(15) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(16) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(17) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and

(18) Section 10, chapter 206, Laws of 1977 ex. sess. and





RCW 10.94.900.

NEW SECTION. Sec. 26. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

House Floor Amendment to House Bill No. 76.
By Representative Schmidt

On page 7, line 17, after "unanimously." add: "In order to return a negative answer to the question posed by this subsection, the jury must so find with at least ten votes. If the jury, after due deliberation, is unable to answer the question posed by this subsection, the trial court may declare a mistrial."

ADOPTED 3/11/81

8 affirmative by the question.

SHB 76

On page 8, line 14, after "jury" strike "fails to return an affirmative" and add "returns a negative"

ADOPTED 3/11/81

House Floor Amendment to Substitute House Bill No. 76
By Representatives Brown, Owen and Schmidt

Beginning on page 15, line 21, after "Sec. 19" strike all material down to and including "penitentiary." on page 16, line 1, and insert:

"(1) The punishment of death prescribed by law must be inflicted by hanging by the neck until death is pronounced by a licensed physician, which shall be supervised by the superintendent of the penitentiary.

(2) If the execution of the sentence provided by subsection (1) of this section is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be executed by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician, which shall be supervised by the superintendent of the penitentiary."

ADOPTED 3/12/81

passed

PROPOSED AMENDMENTS TO PROPOSED SUBSTITUTE HOUSE BILL NO. 76
By Representative Padden

8/16

(1) On page 3, line 22 after "attorney;" strike everything through "government;" on line 23.

(2) On page 3, line 25 after "of" insert "official"

~~(3) On page 3, line 26 after "victim" insert "in relation to the defendant"~~

8/16

(4) On page 3, line 36 strike "or attempted robbery"

(5) On page 4, line 2 strike "or attempted rape"

(6) On page 4, line 4 strike "or attempted burglary"

(7) On page 4, line 6 strike "or attempted kidnapping"

(8) On page 4, line 8 strike "or attempted arson"

8/16

(9) On page 7, line 20 after "unanimously." strike everything through "mistrial." on line 25.

(10) On page 8, line 22 strike "returns a negative" and insert "fails to return an affirmative"

passed 14/0 = oral vote

PROPOSED AMENDMENT TO PROPOSED SUBSTITUTE HOUSE BILL NO. 76
By ~~Representative~~ Padden

On page 7, line 5 after "activity." insert "The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence."

1st Sub. H. B. 76 By House Committee on Ethics, Law and Justice

Revising provisions pertaining to capital punishment.

(AS OF HOUSE 2ND READING-3/12/81)

Prohibits any supreme court rule from superseding any provision of this legislation.

Imposes mandatory life imprisonment for first degree murder which may not be suspended or deferred.

Enumerates aggravating circumstances which constitute the crime of aggravated first degree murder. Authorizes death sentence when the trier of fact finds insufficient mitigating circumstances to merit leniency in a prescribed special sentencing proceeding. Prohibits suspension, deferral, parole, or furlough for persons serving life sentence for such crime.

Prescribes procedure to be followed by the prosecutor. Requires notice of special sentencing proceeding to be filed and served on the defendant. Prohibits plea of guilty.

Prescribes procedure to be followed in the special sentencing proceeding for jury selection, attorney's arguments, evidence, consideration of factors, and findings. Requires unanimous vote for an affirmative finding and 10 votes for negative findings.

Requires mandatory review by the supreme court in addition to any appeal within prescribed time frame.

Prescribes method of execution and alternative.

--1981 REGULAR SESSION--

Mar 4 Majority; 1st substitute bill be substituted, do pass.
Passed to Rules committee for second reading.

Mar 6 Placed on second reading by Rules committee.

Mar 11 1st substitute bill substituted.
AMENDED.
Held on second reading for Mar 12.

Mar 12 AMENDED.
Passed to Rules committee for third reading.

SHB 76

C 138 L 81

BRIEF TITLE: Revising provisions pertaining to capital punishment.

SPONSORS: House Committee on Ethics, Law and Justice
(Originally Sponsored By Representatives Schmidt, Tilly, Dawson, Patrick, James, Johnson, Nelson (G.), Struthers, Winsley, Barr, Addison, Hastings, Granlund, Walk and Owen)

HOUSE COMMITTEE: Ethics, Law and Justice

SENATE COMMITTEE: Judiciary

Staff: Tom Hoemann (753-7719)
Committee Hearing Dates (Session): April 16, 1981

Majority Report (DPA) signed by: Senators Clarke, Newhouse, Pullen, Woody and Hayner

## SYNOPSIS AS ENACTED

BACKGROUND:

Washington's current death penalty law has been declared unconstitutional. The Washington Supreme Court held that because the law prohibited the imposition of the death penalty in cases where the defendant had pleaded guilty or had been tried by a court without a jury, a defendant is unconstitutionally forced to give up his right to a trial or a trial by jury to avoid the death penalty. In other words, a defendant who insisted on his constitutional right to a trial or a trial by jury ran the risk of being sentenced to death.

The death penalty law required a sentencing jury to answer questions before the death penalty could be imposed. Questions which had to be answered affirmatively included whether guilt has been established with "clear certainty," and whether there is probability beyond a reasonable doubt that the defendant would commit additional criminal acts of violence.

The law also established a number of "aggravating circumstances," of which at least one must have been present to turn a first-degree murder into an offense punishable by death. Among those aggravating circumstances were the murders of judges, jurors, witnesses, prosecutors or defense attorneys who were murdered because of official duties performed in relation to the defendant.

SUMMARY:

A procedure is established for impaneling a sentencing jury in cases in which a defendant pleads guilty, or in which the defendant is tried and found guilty without a jury, or in which for any reason the jury which finds the defendant guilty cannot be impaneled for sentencing.

The questions which the sentencing jury must answer before imposing the death penalty are replaced with the single question of whether there are "sufficient mitigating circumstances to merit leniency."

The list of victims whose murder constitutes an aggravating circumstance is expanded to include prospective, former, and current witnesses; and former and current jurors, deputy prosecuting attorneys, members of the board of prison terms and paroles, and parole or probation officers.

The state supreme court must conduct its mandatory review of a death penalty sentence within one year of the court's receipt of the trial court's transcript.

The method of execution is to be hanging or, at the option of the defendant, a lethal, intravenous injection.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Appropriation: none
Revenue: none
Fiscal Note: none requested

VOTES ON FINAL PASSAGE:

| | | |
|---|---|---|
| House | 70 | 28 |
| Senate | 30 | 16 |

EFFECTIVE: May 14, 1981

ARGUMENTS AND TESTIMONY
AT SENATE COMMITTEE HEARING(S)

Arguments For: The bill is necessary because of concern about the constitutionality of the present death penalty statute. It will insure that the public's desire for this form of criminal punishment is carried out.

Arguments Against: The death penalty has not been proven to be an effective deterrent to violent crime.

The concerns surrounding the constitutionality of the current death penalty law could be addressed by a more narrowly drawn and less comprehensive bill.

Testified For: Representative Schmidt; Larry McKeernan, Prosecutors Association

Testified Against: Bob Boruchowitz, Seattle-King County Defenders Association; Tom Ford; Carl Tygee

Ethics

Senate Committee Amendments to ESHB 76
By Judiciary Committee

On page 2, line 11, delete all of section 1 and renumber the remaining sections consecutively

APR 21 1981 ADOPTED

Senate Committee Amendments to ESHB 76
By Judiciary Committee

On page 7, line 17 after the period, strike all material down to and including the period on line 22

APR 21 1981 ADOPTED

Senate Committee Amendments to ESHB 76
By Judiciary Committee

On page 8, line 19, after "jury" strike "returns a negative" and insert "does not return an affirmative"

APR 21 1981 ADOPTED

Senate Committee Amendments to ESHB 76
By Judiciary Committee

On page 15, line 21, after "death" strike all material down to and including "family" on line 25

APR 21 1981 ADOPTED

On page 15, line 26 after "(1)" strike all material down to and including "penitentiary" on line 29 and insert "The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted either by hanging by the neck until death is pronounced by a licensed physician or, 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"

APR 21 1981 ADOPTED

On page 15, line 30, strike all of subsection (2) and renumber the remaining subsection consecutively

APR 21 1981 ADOPTED

Senate Amendment to Substitute House
Bill No. 76
By Senator Hemstad

On page 5, after line 11, add the following subsection:

"(4) Upon receiving the notice of special proceeding, the court may appoint counsel to assist the defendant's attorney where the court believes such assistance is required to provide the defendant an effective defense. Counsel appointed pursuant to this section shall have at least five years experience in criminal law in the state of Washington and shall be approved by the Criminal Law Section of the Washington State Bar Association, who shall maintain a list of attorneys qualified to represent criminal defendants subject to the sentence of death. The cost of counsel appointed pursuant to this section shall be borne by the state."

APR 21 1981 ADOPTED

WASHINGTON STATE SENATE ROLL CALL 32

# 47th LEGISLATURE - 1981 - REGULAR SESSION

ON Final Passage - E2SHB 76 as amended by Senate

DATE 4-21, 1981

| NAME | YEA | NAY | ABSENT | EXCUSED | NAME | YEA | NAY | ABSENT | EXCUSED |
|---|---|---|---|---|---|---|---|---|---|
| Bauer | 1 | | | | Lysen | | | 1 | |
| Benitz | 2 | | | | McCaslin | 16 | | | |
| Bluechel | | 1 | | | McDermott | | 4 | | |
| Bottiger | 3 | | | | Metcalf | 19 | | | |
| Charnley | | 2 | | | Moore | | 10 | | |
| Clarke | 4 | | | | Newhouse | 20 | | | |
| Conner | | 3 | | | Patterson | 21 | | | |
| Craswell | 5 | | | | Peterson | 22 | | | |
| Deccio | 6 | | | | Pullen | 23 | | | |
| Fleming | | 4 | | | Quigg | 24 | | | |
| Fuller | 7 | | | | Rasmussen | 25 | | | |
| Gallaghan | 8 | | | | Ridder | | 11 | | |
| Gaspard | 9 | | | | Scott | 26 | | | |
| Goltz | | 5 | | | Sellar | 27 | | | |
| Gould | | 6 | | | Shinpoch | | 12 | | |
| Guess | 10 | | | | Talley | 28 | | | |
| Haley | 11 | | | | Talmadge | 29 | | | |
| Hansen | 12 | | | | Vognild | 30 | | | |
| Hayner | 13 | | | | vonReichbauer | 31 | | | |
| Hemstad | | 7 | | | Williams | | 13 | | |
| Hughes | 14 | | | | Wilson | | 14 | | |
| Hurley | 15 | | | | Wojahn | | 15 | | |
| Jones | 16 | | | | Woody | 32 | | | |
| Kiskaddon | | 8 | | | Zimmerman | 33 | | | |
| Lee | 17 | | | | | | | | |

YEAS 33 NAYS 15 ABSENT 1 EXCUSED

There being no objection the title of the Bill was ordered to stand as the title of the Act.

~~PROVIDED, That every person convicted of rape in the first degree shall be confined for a minimum of three years. PROVIDED FURTHER, That the board of prison terms and paroles shall have authority to set a period of confinement greater than three years but shall never reduce the minimum three-year period of confinement nor shall the board release the convicted person during the first three years of confinement as a result of any type of automatic good time calculation nor shall the department of social and health services permit the convicted person to participate in any work release program or furlough program during the first three years of confinement.~~))

Sec. 37. Section 9A.20.020, chapter 260, Laws of 1975 1st ex. sess. as amended by section 2, chapter 38, Laws of 1975-'76 2nd ex. sess. and RCW 9A.20.020 are each amended to read as follows:

(1) Felony. ((~~Every~~)) No person convicted of a classified felony shall be punished ((~~as follows~~)) by confinement or fine exceeding the following:

(a) For a class A felony, by ((imprisonment)) confinement in a state correctional institution for a ((maximum)) term ((~~fixed by the court of not less than twenty years~~)) of life imprisonment, or by a fine in an amount fixed by the court of ((~~not more than ten~~)) fifty thousand dollars, or by both such ((imprisonment)) confinement and fine;

(b) For a class B felony, by ((imprisonment)) confinement in a state correctional institution for a ((maximum)) term of ((~~not more than~~)) ten years, or by a fine in an amount fixed by the court of ((~~not more than ten~~)) twenty thousand dollars, or by both such ((imprisonment)) confinement and fine;

(c) For a class C felony, by ((~~imprisonment~~)) confinement in a state correctional institution for ((~~a maximum term of not more than~~)) five years, or by a fine in an amount fixed by the court of ((~~not more than five~~)) ten thousand dollars, or by both such ((imprisonment)) confinement and fine.

(2) Gross Misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than ((one)) five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than ((~~five hundred~~)) one thousand dollars, or by both such imprisonment and fine.

NEW SECTION. Sec. 38. The following acts or parts of acts are hereby repealed, effective July 1, 1984:

(1) Section 1, chapter 175, Laws of 1969 ex. sess. and RCW 9.41.025;

(2) Section 2, chapter 17, Laws of 1967, section 275, chapter 141, Laws of 1979, section 1, chapter 160, Laws of 1979 ex. sess. and RCW 72.65.020;





(3) Section 3, chapter 17, Laws of 1967, section 275, chapter 141, Laws of 1979 and RCW 72.65.030; and

(4) Section 4, chapter 17, Laws of 1967, section 277, chapter 141, Laws of 1979 and RCW 72.65.040.

NEW SECTION. Sec. 39. The following acts or parts of acts are each repealed, effective July 1, 1988:

(1) Section 1, chapter 47, Laws of 1947, section 1, chapter 114, Laws of 1935 and RCW 9.95.001;

(2) Section 9, chapter 340, Laws of 1955, section 1, chapter 32, Laws of 1952, section 9, chapter 98, Laws of 1969, section 8, chapter 34, Laws of 1975-'76 2nd ex. sess. and RCW 9.95.003;

(3) Section 10, chapter 340, Laws of 1955, section 2, chapter 32, Laws of 1959 and RCW 9.95.005; and

(4) Section 3, chapter 32, Laws of 1959, section 1, chapter 63, Laws of 1975-'76 2nd ex. sess. and RCW 9.95.007.

NEW SECTION. Sec. 40. Sections 1 through 23 and 25 through 29 of this act shall constitute a new chapter in Title 9 RCW.

NEW SECTION. Sec. 41. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 42. There is appropriated from the state general fund to the sentencing guidelines commission for the biennium ending June 30, 1983, the sum of six hundred eighty-five thousand dollars, or so much thereof as may be necessary, to carry out the purposes of this act.

Passed the House April 23, 1981.
Passed the Senate April 20, 1981.
Approved by the Governor May 14, 1981.
Filed in Office of Secretary of State May 14, 1981.

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## CHAPTER 138

[Substitute House Bill No. 76]
MURDER, SENTENCING

AN ACT Relating to capital punishment; amending section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040; adding a new chapter to Title 10 RCW; repealing section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045; repealing section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046; repealing section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047; repealing section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010; repealing section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040; repealing section 152, page 125, Laws of 1854, section 221, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050; repealing section

2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060; repealing section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070; repealing section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080; repealing section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090; repealing section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100; repealing section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110; repealing section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120; repealing section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130; repealing section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010; repealing section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020; repealing section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; repealing section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

NEW SECTION. Sec. 2. A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county–city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;





(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnaping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self–employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

NEW SECTION. Sec. 3. (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good–time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under section 5 of this act, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

NEW SECTION. Sec. 4. (1) If a person is charged with aggravated first degree murder as defined by section 2 of this act, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court

accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

NEW SECTION. Sec. 5. (1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by section 4 of this act. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

NEW SECTION. Sec. 6. (1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in section 3 of this act.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal





evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

NEW SECTION. Sec. 7. In deciding the question posed by section 6(4) of this act, the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

NEW SECTION. Sec. 8. (1) If a jury answers affirmatively the question posed by section 6(4) of this act, or when a jury is waived as allowed by section 5(2) of this act and the trial court answers affirmatively the question posed by section 6(4) of this act, the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in section 6(4) of this act, the defendant shall be sentenced to life imprisonment as provided in section 3(1) of this act.

NEW SECTION. Sec. 9. If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by section 6(4) of this act shall be life imprisonment as provided in section 3(1) of this act.

NEW SECTION. Sec. 10. Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by this act.

NEW SECTION. Sec. 11. (1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.





NEW SECTION. Sec. 12. In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

(1) Information about the defendant, including the following:

(a) Name, date of birth, gender, marital status, and race and/or ethnic origin;

(b) Number and ages of children;

(c) Whether his or her parents are living, and date of death where applicable;

(d) Number of children born to his or her parents;

(e) The defendant's educational background, intelligence level, and intelligence quotient;

(f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

(i) Able to distinguish right from wrong;

(ii) Able to perceive the nature and quality of his or her act; and

(iii) Able to cooperate intelligently with his or her defense;

(g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;

(h) The work record of the defendant;

(i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and

(j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

(a) The defendant's plea;

(b) Whether defendant was represented by counsel;

(c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;

(d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;

(e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and

(f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

(a) The date the defendant was convicted and date the special sentencing proceeding commenced;

(b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;

(c) Whether there was evidence of mitigating circumstances;

(d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in section 7 of this act;

(e) The jury's answer to the question posed in section 6(4) of this act;

(f) The sentence imposed.

(4) Information about the victim, including:

(a) Whether he or she was related to the defendant by blood or marriage;

(b) The victim's occupation and whether he or she was an employer or employee of the defendant;

(c) Whether the victim was acquainted with the defendant, and if so, how well;

(d) The length of time the victim resided in Washington and the county;

(e) Whether the victim was the same race and/or ethnic origin as the defendant;

(f) Whether the victim was the same sex as the defendant;

(g) Whether the victim was held hostage during the crime and if so, how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;

(i) The victim's age; and

(j) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

(a) Date counsel secured;

(b) Whether counsel was retained or appointed, including the reason for appointment;

(c) The length of time counsel has practiced law and nature of his or her practice; and

(d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

(a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;

(b) What percentage of the county population is the same race and/or ethnic origin of the defendant;

(c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;

(d) Whether there was evidence that such members were systematically excluded from the jury;





(e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;

(f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;

(g) Whether there was extensive publicity concerning the case in the community;

(h) Whether the jury was instructed to disregard such publicity;

(i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;

(j) The nature of the evidence resulting in such instruction; and

(k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

(a) The defendant was arrested;

(b) Trial began;

(c) The verdict was returned;

(d) Post-trial motions were ruled on;

(e) Special sentencing proceeding began;

(f) Sentence was imposed;

(g) Trial judge's report was completed; and

(h) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

NEW SECTION. Sec. 13. (1) The sentence review required by section 10 of this act shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by this act, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by section 6(4) of this act; and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under section 12 of this act; and

(c) Whether the sentence of death was brought about through passion or prejudice.

NEW SECTION. Sec. 14. Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with section 9 of this act if:

(a) The court makes a negative determination as to the question posed by section 13(2)(a) of this act; or

(b) The court makes an affirmative determination as to either of the questions posed by section 13(2)(b) or (c) of this act.

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with section 16 of this act if:

(a) The court makes an affirmative determination as to the question posed by section 13(2)(a) of this act; and

(b) The court makes a negative determination as to the question posed by section 13(2)(b) and (c) of this act.

NEW SECTION. Sec. 15. In all cases in which a sentence of death has been imposed, the appeal, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under section 11 of this act. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

NEW SECTION. Sec. 16. If a death sentence is affirmed and the case remanded to the trial court as provided in section 14(2) of this act, a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

NEW SECTION. Sec. 17. The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in section 16 of this act. During such period of imprisonment, the defendant shall be confined in segregation from other prisoners not under sentence of death





NEW SECTION. Sec. 18. (1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted either by hanging by the neck until death is pronounced by a licensed physician or, 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.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. Sec. 19. (1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

NEW SECTION. Sec. 20. Whenever the day appointed for the execution of a defendant shall have passed, from any cause whatever, without the execution of such defendant having occurred, the defendant shall be returned to the trial court from which the death warrant was issued and the trial court shall issue a new death warrant in accordance with section 16 of this act.

Sec. 21. Section 9A.32.040, chapter 260, Laws of 1975 1st ex. sess. as amended by section 3, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.040 are each amended to read as follows:

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced ((as follows:

~~(1) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to RCW 10.94.020(10), the sentence shall be death;~~

~~(2) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to RCW 10.94.020(10), the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce~~

~~the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and~~

~~(3) In all other convictions for first degree murder, the sentence shall be life imprisonment))~~ to life imprisonment.

NEW SECTION. Sec. 22. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 23. Sections 1 through 20 of this act shall constitute a new chapter in Title 10 RCW.

NEW SECTION. Sec. 24. The following acts or parts of acts are each repealed:

(1) Section 1, chapter 9, Laws of 1975-'76 2nd ex. sess., section 4, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.045;

(2) Section 2, chapter 9, Laws of 1975-'76 2nd ex. sess., section 5, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.046;

(3) Section 3, chapter 9, Laws of 1975-'76 2nd ex. sess., section 6, chapter 206, Laws of 1977 ex. sess. and RCW 9A.32.047;

(4) Section 87, page 115, Laws of 1854, section 223, page 231, Laws of 1873, section 1062, Code of 1881 and RCW 10.49.010;

(5) Section 8, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.040;

(6) Section 152, page 125, Laws of 1854, section 291, page 152, Laws of 1860, section 288, page 244, Laws of 1873, section 1130, Code of 1881, section 1, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.050;

(7) Section 2, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.060;

(8) Section 6, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.070;

(9) Section 3, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.080;

(10) Section 153, page 125, Laws of 1854, section 289, page 244, Laws of 1873, section 1131, Code of 1881 and RCW 10.70.090;

(11) Section 4, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.100;

(12) Section 5, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.110;

(13) Section 155, page 125, Laws of 1854, section 291, page 245, Laws of 1873, section 1133, Code of 1881 and RCW 10.70.120;

(14) Section 154, page 125, Laws of 1854, section 1132, Code of 1881, section 7, chapter 9, Laws of 1901 ex. sess. and RCW 10.70.130;

(15) Section 1, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.010;

(16) Section 2, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.020;

(17) Section 7, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.030; and





(18) Section 10, chapter 206, Laws of 1977 ex. sess. and RCW 10.94.900.

NEW SECTION. Sec. 25. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House April 26, 1981.
Passed the Senate April 26, 1981.
Approved by the Governor May 14, 1981.
Filed in Office of Secretary of State May 14, 1981.

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## CHAPTER 139

[Engrossed Substitute Senate Bill No. 3307]

## CONTROL OF GAMBLING

AN ACT Relating to the control of gambling; reenacting and amending section 3, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 2, chapter 165, Laws of 1977 ex. sess. and by section 2, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.030; reenacting and amending section 7, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 2, chapter 76, Laws of 1977 ex. sess. and by section 3, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.070; amending section 12, chapter 166, Laws of 1975 1st ex. sess. and RCW 9.46.075; amending section 8, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 4, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.080; amending section 9, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 4, chapter 15, Laws of 1977 and RCW 9.46.090; amending section 11, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 1, chapter 198, Laws of 1977 ex. sess. and RCW 9.46.110; amending section 1, chapter 87, Laws of 1975-'76 2nd ex. sess. as amended by section 6, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.115; amending section 13, chapter 218, Laws of 1973 1st ex. sess. as amended by section 7, chapter 166, Laws of 1975 1st ex. sess. and RCW 9.46.130; amending section 21, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 15, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.210; amending section 23, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 16, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.230; creating new sections; adding new sections to chapter 218, Laws of 1973 1st ex. sess. and to chapter 9.46 RCW; providing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2, chapter 218, Laws of 1973 1st ex. sess. as last amended by section 1, chapter 76, Laws of 1977 ex. sess. and by section 1, chapter 326, Laws of 1977 ex. sess. and RCW 9.46.020 are each reenacted and amended to read as follows:

(1) "Amusement game" means a game played for entertainment in which:

(a) The contestant actively participates;

(b) The outcome depends in a material degree upon the skill of the contestant;

(c) Only merchandise prizes are awarded;

(d) The outcome is not in the control of the operator;

# APPENDIX 18

**ENGROSSED SUBSTITUTE SENATE BILL NO. 4683**

**State of Washington 49th Legislature 1986 Regular Session**

**By** Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Read first time 1/24/86.

AN ACT Relating to the death penalty; and amending RCW 10.95.180.

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

**Sec. 1.** Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 are each amended to read as follows:

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted either by hanging by the neck ((~~until death is pronounced by a licensed physician~~)) or, 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~~)) intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead. Death shall be pronounced by the medical examiner or coroner of the county in which the execution takes place.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

FINAL BILL REPORT

SSB 4683

C 194 L 86

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

House Committee on Social & Health Services

## SYNOPSIS AS ENACTED

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

VOTES ON FINAL PASSAGE:

| | | | |
|---|---|---|---|
| Senate | 44 | 0 | |
| House | 81 | 15 | (House amended) |
| Senate | 43 | 2 | (Senate concurred) |

EFFECTIVE: June 11, 1986

FINAL BILL REPORT

SSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

House Committee on Social & Health Services

AS PASSED LEGISLATURE

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

VOTES ON FINAL PASSAGE:

| | | | |
|---|---|---|---|
| Senate | 44 | 0 | |
| House | 81 | 15 | (House amended) |
| Senate | 43 | 2 | (Senate concurred) |

EFFECTIVE: 90 days after adjournment of 1986 Regular Session

SENATE BILL REPORT

ESSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

Senate Hearing Date(s): January 22, 1986; January 23, 1986

Majority Report: That Substitute Senate Bill No. 3683 be substituted therefor, and the substitute bill do pass.
Signed by Senators Wojahn, Chairman; Kreidler, Vice Chairman; Conner, Craswell, Deccio, Granlund, Johnson, Kiskaddon, McDonald, Peterson.

Senate Staff: Vicki Fabre (786-7747); Louise Bray Nash (786-7452)
March 7, 1986

House Committee on Social & Health Services

AS PASSED SENATE, FEBRUARY 16, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

The medical examiner or coroner of the county in which the execution takes place shall pronounce the defendant's death.

Fiscal Note: available

Senate Committee - Testified: John King, DOC; Kip Kautzky, Director, Division of Prisons, DOC; Bob Stalker, Evergreen Legal Services; Carol Smith, Assistant Attorney General, DOC; Kathy Spong, Assistant Attorney General, DOC

HOUSE AMENDMENT:

The defendant shall be pronounced dead by a licensed physician rather than the medical examiner or coroner.

# SENATE BILL REPORT

## SB 4683

BY Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

Senate Hearing Date(s): January 22, 1986; January 23, 1986

Majority Report: That Substitute Senate Bill No. 3683 be substituted therefor, and the substitute bill do pass.
Signed by Senators Wojahn, Chairman; Kreidler, Vice Chairman; Conner, Craswell, Deccio, Granlund, Johnson, Kiskaddon, McDonald, Peterson.

Senate Staff: Vicki Fabre (786-7747); Louise Bray Nash (786-7452)
January 23, 1986

AS REPORTED BY COMMITTEE ON HUMAN SERVICES & CORRECTIONS, JANUARY 23, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

EFFECT OF PROPOSED SUBSTITUTE:

Language is added that requires the medical examiner of the county in which the execution takes place to pronounce the defendant's death.

Fiscal Note: available

Senate Committee - Testified: John King, DOC; Kip Kautzky, Director, Division of Prisons, DOC; Bob Stalker, Evergreen Legal Services; Carol Smith, Assistant Attorney General, DOC; Kathy Spong, Assistant Attorney General DOC

SENATE BILL REPORT

SB 4683

BY Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

Senate Hearing Date(s): January 22, 1986

Senate Staff: Vicki Fabre (786-7747); Louise Bray Nash (786-7452)

AS OF JANUARY 21, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

Fiscal Note: requested

# FISCAL NOTE

REQUEST NUMBER .....

Department of Corrections
Responding Agency

Code No.

Bill No. Z1054/86

January 15, 1986
Date Submitted

This proposal is to amend RCW 10.95.160-190 to allow the use of modern up-to-date lethal solutions rather than limit the choice to sodium thiopental. The fiscal impact for this provision would be negligible, if any, for the administering of lethal solutions other than sodium thiopental.

Form FN [illegible]

# FISCAL NOTE

BILL NO. Z1054/86 SB 4683

REQUEST NO.

TITLE

ACT RELATING TO THE DEATH PENALTY

RESPONDING AGENCY: Department of Corrections

PREPARED BY: Edward M. Simko, Jr. — DATE: January 15, 1986

TITLE: Comptroller, Div. Management & Budget — SCAN: 234-5491

REVIEWED BY OFM: Dennis Hunter — DATE: 1/21/86

Fiscal impact of the above legislation on Washington State government is estimated to be:

☒ NONE

☐ AS SHOWN BELOW

Figures in parentheses represent reductions. Detail supporting these estimates is contained in Form FN-2.

**REVENUE TO:**

First Biennium 19 85 — 19 87

| FUND | CODE | SOURCE TITLE | CODE | 1ST YEAR | 2ND YEAR | TOTAL | FIRST SIX YEARS |
|---|---|---|---|---|---|---|---|
| GENERAL FUND — STATE | 001 | | | | | | |
| GENERAL FUND — FEDERAL | 001 | | | | | | |
| OTHER * | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| TOTALS | | | | | | | |

**EXPENDITURES FROM:**

| FUND | CODE | |
|---|---|---|
| GENERAL FUND — STATE | 001 | - |
| GENERAL FUND — FEDERAL | 001 | NO FISCAL IMPACT |
| OTHER * | | |
| | | |
| | | |
| | | |
| TOTALS | | |

* Itemize all other, including non-appropriated funds and/or accounts within the General Fund.

**EXPENDITURES BY OBJECT OR PURPOSE:**

| | |
|---|---|
| FTE STAFF YEARS | |
| SALARIES AND WAGES | |
| PERSONAL SERVICE CONTRACTS | |
| GOODS AND SERVICES | |
| TRAVEL | |
| EQUIPMENT | NO FISCAL IMPACT |
| EMPLOYEE BENEFITS | |
| GRANTS AND SUBSIDIES | |
| INTERAGENCY REIMBURSEMENT | |
| DEBT SERVICE | |
| CAPITAL OUTLAYS | |
| TOTALS | |

Check this box if the above legislation has cash flow impact per instructions: ☐
Show cash flow impact on FN-2.

Check this box if the above legislation has fiscal impact on local governments: ☐
Do not include local government impact on FN-1.

FN 1 (Rev 12/82) 5.18

ESSB 4683 - H Comm Amd
By Committee on Social and Health Services
ADOPTED MAR

On page 1, line 12, after "dead." strike the remaining language in subsection (1) and insert "In any case, death shall be pronounced by a licensed physician."

AN ACT Relating to the death penalty; and amending RCW 10.95.180. CR85B

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: F

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 S
are each amended to read as follows: -4225

(1) The punishment of death shall be supervised by the ;1
superintendent of the penitentiary and shall be inflicted either by PARTA
hanging by the neck ((~~until--death--is--pronounced--by--a--licensed~~ ;1
~~physician~~)) or, at the election of the defendant, by ((~~continuous~~ 12
~~intravenous-administration-of-a--lethal--dose--of--sodium--thiopental~~ 14
~~until--death--is--pronounced--by--a--licensed-physician~~)) intravenous 15
injection of a substance or substances in a lethal quantity 16
sufficient to cause death and until the defendant is dead. Death 17
shall be pronounced by the medical examiner of the county in which 17
the execution takes place. 18

(2) All executions, for both men and women, shall be carried out 19
within the walls of the state penitentiary. 20

# FLOOR NOTES

## SSB 4683

BRIEF TITLE:

REVISING PROVISIONS RELATING TO THE DEATH PENALTY.

PRIME SPONSOR:

SENATOR RASMUSSEN

DEPARTMENT OF CORRECTIONS REQUEST LEGISLATION

WHAT THE BILL DOES:

CURRENTLY, IF A DEFENDANT UNDER SENTENCE OF DEATH CHOOSES LETHAL INJECTION OVER HANGING, HE OR SHE WILL BE EXECUTED BY AN INTRAVENOUS INJECTION OF SODIUM THIOPENTAL. THE BILL DELETES THE SPECIFIC DRUG AND REQUIRES ONLY AN INJECTION OF A LETHAL SUBSTANCE.

WHAT THE SUBSTITUTE BILL DOES:

LANGUAGE IS ADDED REQUIRING THE MEDICAL EXAMINER OF THE COUNTY IN WHICH THE EXECUTION TAKES PLACE TO PRONOUNCE DEATH.

WHY IT IS NEEDED:

SODIUM THIOPENTAL USED ALONE COULD CAUSE MASSIVE, PROLONGED CONVULSIONS. THE BILL ALLOWS THE USE OF THE MOST EFFECTIVE SUBSTANCE CURRENTLY AVAILABLE WHEN AN EXECUTION TAKES PLACE.

THE SUBSTITUTE CLEANS UP THE ORIGINAL DRAFTING.

FISCAL IMPLICATIONS OF THE BILL:

NONE

PERSONS WHO SPOKE FOR AND AGAINST THE BILL:

JOHN KING, DEPARTMENT OF CORRECTIONS - PRO

KIP KAUTZKY, DIRECTOR, DIVISION OF PRISONS - PRO

CAROL SMITH, ASSISTANT ATTORNEY GENERAL - PRO

KATHY SPONG, ASSISTANT ATTORNEY GENERAL, DOC - PRO

GERRY SHEEHAN, AMERICAN CIVIL LIBERTIES UNION - CON

COMMENTS:

THE MEDICAL EXAMINER LANGUAGE WAS ADDED BECAUSE THERE WAS TESTIMONY THAT SOME PHYSICIANS WERE OPPOSED TO BEING REQUIRED TO PRONOUNCE DEATH AS IT IS A VIOLATION OF THE HIPPOCRATIC OATH.

COUNTY MEDICAL EXAMINERS ARE REQUIRED TO ATTEND EXECUTIONS UNDER CURRENT LAW.

# CONCURRENCE

## ESSB 4683

REVISING PROVISIONS RELATING TO THE DEATH PENALTY.

(AS AMENDED BY THE HOUSE OF REPRESENTATIVES)

ESSB 4683 AUTHORIZES THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS TO USE ANY LETHAL SUBSTANCE TO CAUSE THE DEATH OF A CONDEMNED PERSON. DEATH IS PRONOUNCED BY THE MEDICAL EXAMINER OR OR CORONER OF THE COUNTY IN WHICH THE EXECUTION TAKES PLACE.

WHAT THE HOUSE COMMITTEE AMENDMENT DOES:

THE HOUSE AMENDMENT RESTORES THE CURRENT STATUTORY REQUIREMENT THAT A LICENSED PHYSICIAN PRONOUNCE DEATH.

CORONERS ARE NOT PHYSICIANS AND ARE THEREFORE NOT QUALIFIED TO PRONOUNCE DEATH. WALLA WALLA COUNTY, WHERE ALL EXECUTIONS TAKE PLACE, HAS A CORONER, NOT A MEDICAL EXAMINER.

STAFF RECOMMENDATION:

STAFF RECOMMENDS THAT THE SENATE DO CONCUR IN THE HOUSE AMENDMENT.

SSB 4683 - S Amd
By Senator Wojahn

AMD85
SB

ADOPTED 2/16/86

1-468

On line 13, after "examiner" insert "or coroner"

3;1
S

SENATE BILL NO. 4683

by Senators Rasmussen, Owen and Deccio; by request of Department of Corrections Metcalf

Revising provisions relating to the death penalty.

Read first time 1/20/86 and referred to Committee on ~~Judiciary~~ Human Services

AN ACT Relating to the death penalty; and amending RCW 10.95.180. CR85B

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: F

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 Z
are each amended to read as follows: -1054

(1) The punishment of death shall be supervised by the ;1
superintendent of the penitentiary and shall be inflicted either by PARTA
hanging by the neck until death is pronounced by a licensed physician ;5
or, 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~~)) intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the inmate is dead.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

REPORT OF STANDING COMMITTEE

January 23, 1986

Senate Bill NO. 4683

(Type in brief title exactly as it appears on back cover of original bill)

Revising provisions relating to the death penalty.

(reported by Committee on Human Services and Corrections): (11)

Recommendation - Majority

____ Do pass

____ Do pass as amended

X That Substitute Senate Bill No. _____ be substituted therefor, and the substitute bill do pass

____ Other _____

Wojahn, Chairman
Kreidler, Vice Chairman
Conner
Craswell
Deccio
Granlund
Johnson
Kiskaddon
McDonald
Peterson
Stratton

R. Lorraine Wojahn, Chairman

Mike Kreidler, Vice Chairman

Paul H. Conner

Ellen Craswell

Alex A. Deccio

Win Granlund

Stanley C. Johnson

Bill Kiskaddon

Dan McDonald

Lowell Peterson

Lois J. Stratton

Passed to Committee on Rules for Second Reading

AN ACT Relating to the death penalty; and amending RCW 10.95.180. CR85B

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: F

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 S
are each amended to read as follows: -4225

(1) The punishment of death shall be supervised by the ;1
superintendent of the penitentiary and shall be inflicted either by PARTA
hanging by the neck ~~((until--death--is--pronounced--by--a--licensed~~ ;1
~~physician))~~ or, at the election of the defendant, by ~~((continuous,~~ 12
~~intravenous-administration-of-a--lethal--dose--of--sodium--thiopental~~ 14
~~until--death--is--pronounced--by--a--licensed-physician))~~ intravenous 15
injection of a substance or substances in a lethal quantity 16
sufficient to cause death and until the defendant is dead. Death 17
shall be pronounced by the medical examiner of the county in which 17
the execution takes place. 18

(2) All executions, for both men and women, shall be carried out 19
within the walls of the state penitentiary. 20

SUBSTITUTE SENATE BILL NO. 4683

State of Washington 49th Legislature 1986 Regular Session

by Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Read first time 1/24/86.

AN ACT Relating to the death penalty; and amending RCW 10.95.180.

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

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 are each amended to read as follows:

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted either by hanging by the neck ((~~until death is pronounced by a licensed physician~~)) or, 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~~)) intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead. Death shall be pronounced by the medical examiner of the county in which the execution takes place.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

ENGROSSED SUBSTITUTE SENATE BILL NO. 4683

State of Washington 49th Legislature 1986 Regular Session

by Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Read first time 1/24/86.

AN ACT Relating to the death penalty; and amending RCW 10.95.180. BILL8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: 5

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 SB are each amended to read as follows: 1-468

(1) The punishment of death shall be supervised by the 3;2 superintendent of the penitentiary and shall be inflicted either by PARTA hanging by the neck ((~~until--death--is--pronounced--by--a--licensed physician~~)) or, 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~~)) intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead. Death shall be pronounced by the medical examiner or coroner of the county in which the execution takes place.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

# FINAL BILL REPORT

## SSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

House Committee on Social & Health Services

## AS PASSED LEGISLATURE

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

VOTES ON FINAL PASSAGE:

| | | | |
|---|---|---|---|
| Senate | 44 | 0 | |
| House | 81 | 15 | (House amended) |
| Senate | 43 | 2 | (Senate concurred) |

EFFECTIVE: 90 days after adjournment of 1986 Regular Session

# SENATE BILL REPORT

## ESSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

Senate Hearing Date(s): January 22, 1986; January 23, 1986

Majority Report: That Substitute Senate Bill No. 3683 be substituted therefor, and the substitute bill do pass.
Signed by Senators Wojahn, Chairman; Kreidler, Vice Chairman; Conner, Craswell, Deccio, Granlund, Johnson, Kiskaddon, McDonald, Peterson.

Senate Staff: Vicki Fabre (786-7747); Louise Bray Nash (786-7452)
February 19, 1986

## AS PASSED SENATE, FEBRUARY 16, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

The medical examiner or coroner of the county in which the execution takes place shall pronounce the defendant's death.

Fiscal Note: available

Senate Committee - Testified: John King, DOC; Kip Kautzky, Director, Division of Prisons, DOC; Bob Stalker, Evergreen Legal Services; Carol

Smith, Assistant Attorney General, DOC; Kathy Spong, Assistant Attorney General, DOC

Appropriation: _____
Revenue: _____
Fiscal Note: No impact.

# HOUSE BILL REPORT

## ESSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

House Committee on Social & Health Services

Majority Report: Do pass with amendment. (11)
Signed by Representatives Brekke, Chair; Day, Vice Chair; Armstrong, Ballard, Bond, Braddock, Brooks, Dobbs, Padden, Scott and Tanner.

Minority Report: Do not pass. (4)
Signed by Representatives Dellwo, Leonard, Lux and Winsley.

House Staff: Jean Wessman (786-7132)

AS REPORTED BY COMMITTEE ON SOCIAL & HEALTH SERVICES
FEBRUARY 25, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

BILL AS AMENDED: A specific drug, sodium thiopental, is deleted as the drug for use in carrying out the death sentence and replaced by the generic phrase of a substance sufficient to cause death. Death must be pronounced by a licensed physician after the sentence of death is carried out either by hanging or lethal injection.

AMENDED BILL COMPARED TO ENGROSSED BILL: The requirement of a licensed physician to pronounce death is restored and medical examiner deleted.

Fiscal Note: No Impact.

House Committee - Testified For Original Measure in Committee: John King, Department of Corrections; and Jim Goche, Washington Association of County Officials.

House Committee - Testified Against Original Measure in Committee: Jerry Sheehan, American Civil Liberties Union.

House Committee - Testimony For: The currently named drug causes severe convulsions when used. It is requested that a specifically named drug be deleted in order that the Department may take advantage of the latest advances in drugs used for this purpose.

House Committee - Testimony Against: No change should be made to a statute that is objectionable in its totality. The state should be aware of what drug is being used for a lethal injection in such an important area.

# HOUSE OF REPRESENTATIVES

*Olympia, Wash.*

## ROLL CALL VOTE

BILL NO. ESSB 4683

DATE: 2-25-86

Committee on Social and Health Services (17)

VOTING ON:

Final Passage DPA

(DP, DPA, DPS, DP2S)

| MEMBER | AYE | NAY | ABSENT = A EXCUSED = E | NOT VOTING | CHANGE VOTE |
|---|---|---|---|---|---|
| BREKKE, Chair | 12 | | | | |
| DAY, Vice-Chair | 1 | | | | |
| ARMSTRONG | 2 | | | | |
| BALLARD | 3 | | | | |
| BOND | 4 | | | | |
| BRADDOCK | 5 | | | | |
| BROOKS | 6 | | | | |
| DELLWO | | 1 | | | |
| DOBBS | 7 | | | | |
| LEONARD | | 2 | | | |
| LEWIS | 8 | | | | |
| LUX | | 3 | | | |
| PADDEN | 9 | | | | |
| SCOTT | 10 | | | | |
| TANNER | 11 | | | | |
| WEST | | | E | | |
| WINSLEY | | 4 | | | |
| TOTAL | 12 | 4 | 1E | | |
| Change Vote | - | - | | | |
| TOTAL | 12 | 4 | | | |

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

February 25, 1986
(date)

Engrossed Substitute Senate Bill No. 4683
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* Committee on Human Services & Corrections

Revising provisions relating to the death penalty.
(Type in brief title exactly as it appears on back cover of original bill)

*reported by Committee on* Social and Health Services (17)

☐ *MAJORITY recommendation: Do Pass.*

☐ *MAJORITY recommendation: The substitute bill be substituted therefor and the substitute bill do pass.*

☒ *MAJORITY recommendation: Do pass with the following amendment(s):*

ESSB 4683 - H Comm Amd
By Committee on Social and Health Services

On page 1, line 12, after "dead." strike the remaining language in subsection (1) and insert "In any case, death shall be pronounced by a licensed physician."

*Signed by*

*Representatives* (11)

BREKKE — Chairman
DAY — Vice Chairman
ARMSTRONG
BALLARD
BOND
BRADDOCK
BROOKS
~~DELLWO~~
DOBBS
~~LEONARD~~
~~LEWIS~~
~~LUX~~
FALCON
SCOTT
TANNER
~~WEST~~
WINSLEY

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

February 25, 1986
(date)

Engrossed Substitute Senate Bill No. 4683
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* Committee on Human Services & Corrections

Revising provisions relating to the death penalty.
(Type in brief title exactly as it appears on back cover of original bill)

*reported by Committee on* Social and Health Services (17)

*MINORITY recommendation:* Do not pass.

*Signed by*

*Representatives* (4)

~~BREGER~~ *Chairman*

~~DAY~~ *Vice Chairman*

~~ARMSTRONG~~

BALLARD

BOND

~~BRADDOCK~~

BROOKS

DELLWO

~~HOUG~~

LEONARD

LEWIS

LUX

~~PADDEN~~

~~SCOTT~~

~~TANNER~~

~~WEST~~

WINSLEY

**ROLL CALL**
Amendments

EXECUTIVE ACTION Bill No. SSB 4085 (Brekke)

VOTE ON: On page 1 line 12 after "dead." strike the remainder of the page in subsection (1) and insert "In any case death shall be pronounced by a licensed physician"

| | AYE | NAY | ABESENT/ EXCUSED | NOT VOTING | CHANGE VOTE |
|---|---|---|---|---|---|
| Armstrong | | | | | |
| Ballard | | | | | |
| Bond | | | | | |
| Braddock | | | | | |
| Brooks | | | | | |
| Day | | | | | |
| Dellwo | | | | | |
| Dobbs | | | | | |
| Leonard | | | | | |
| Lewis | | | | | |
| Lux | | | | | |
| Padden | | | | | |
| Scott | | | | | |
| Tanner | | | | | |
| West | | | | | |
| Winsley | | | | | |
| Brekke | | | | | |
| TOTAL | | | | | |

EXECUTIVE ACTION Bill No. _____

VOTE ON: _____

| | AYE | NAY | ABESENT/ EXCUSED | NOT VOTING | CHANGE VOTE |
|---|---|---|---|---|---|
| Armstrong | | | | | |
| Ballard | | | | | |
| Bond | | | | | |
| Braddock | | | | | |
| Brooks | | | | | |
| Day | | | | | |
| Dellwo | | | | | |
| Dobbs | | | | | |
| Leonard | | | | | |
| Lewis | | | | | |
| Lux | | | | | |
| Padden | | | | | |
| Scott | | | | | |
| Tanner | | | | | |
| West | | | | | |
| Winsley | | | | | |
| Brekke | | | | | |
| TOTAL | | | | | |

012086.4
SHS3

OPR:JW:jy February 24, 1986

ESSB 4683 - H Comm Amd
By Representative Brekke

On page 1, line 12, after "dead." strike the remaining language in subsection (1) and insert "In any case, death shall be pronounced by a licensed physician."

EFFECT: Deletes the Senate amendment that allowed a medical examiner to pronounce death. A medical examiner is not necessarily a licensed physician.

OPR:JW:jy February 24, 1986

ESSB 4683 - H Comm Amd
By Representative Brekke

On page 1, line 12, after "dead." strike the remaining language in subsection (1) and insert "In any case, death shall be pronounced by a licensed physician."

EFFECT: Deletes the Senate amendment that allowed a medical examiner to pronounce death. A medical examiner is not necessarily a licensed physician.

# FISCAL NOTE

REQUEST NO.

BILL NO. Z1054/86 SSB 4683

TITLE

ACT RELATING TO THE DEATH PENALTY

RESPONDING AGENCY: Department of Corrections

PREPARED BY: Edward M. Simko, Jr. — DATE: January 15, 1986

TITLE: Comptroller, Div. Management & Budget — SCAN: 234-5491

REVIEWED BY OFM: [signature] — DATE: 1/21/86

Fiscal impact of the above legislation on Washington State government is estimated to be:

☒ NONE

☐ AS SHOWN BELOW

Figures in parentheses represent reductions. Detail supporting these estimates is contained in Form FN-2.

**REVENUE TO:** First Biennium 19 85 — 19 87

| FUND | CODE | SOURCE TITLE | CODE | 1ST YEAR | 2ND YEAR | TOTAL | FIRST SIX YEARS |
|---|---|---|---|---|---|---|---|
| GENERAL FUND — STATE | 001 | | | | | | |
| GENERAL FUND — FEDERAL | 001 | | | | | | |
| OTHER * | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| TOTALS | | | | | | | |

**EXPENDITURES FROM:**

| FUND | CODE | |
|---|---|---|
| GENERAL FUND — STATE | 001 | - |
| GENERAL FUND — FEDERAL | 001 | NO FISCAL IMPACT |
| OTHER * | | |
| | | |
| | | |
| | | |
| TOTALS | | |

* Itemize all other including non-appropriated funds and/or accounts within the General Fund.

**EXPENDITURES BY OBJECT OR PURPOSE:**

| | |
|---|---|
| FTE STAFF YEARS | |
| SALARIES AND WAGES | |
| PERSONAL SERVICE CONTRACTS | |
| GOODS AND SERVICES | |
| TRAVEL | NO FISCAL IMPACT |
| EQUIPMENT | |
| EMPLOYEE BENEFITS | |
| GRANTS AND SUBSIDIES | |
| INTERAGENCY REIMBURSEMENT | |
| DEBT SERVICE | |
| CAPITAL OUTLAYS | |
| TOTALS | |

Check this box if the above legislation has cash flow impact per instructions: ☐
Show cash flow impact on FN-2.

Check this box if the above legislation has fiscal impact on local governments: ☐
Do not include local government impact on FN-1.

Form FN-1 (Rev. 12/82) 5.18

# FISCAL NOTE

Department of Corrections
Requesting Agency

Code No.

REQUEST NUMBER

Bill No. Z1054/86

January 15, 1986
Date Submitted

This proposal is to amend RCW 10.95.160-190 to allow the use of modern up-to-date lethal solutions rather than limit the choice to sodium thiopental. The fiscal impact for this provision would be negligible, if any, for the administering of lethal solutions other than sodium thiopental.

MMITTEE Social + Health Services
TE 2-25-86

PUBLIC
ATTENDANCE ROSTER

ESSB 4683 - Death Penalty

| NAME | ORGANIZATION | MAILING ADDRESS | PHONE | BILL OR SUBJECT OF INTEREST | WISH TO TESTIFY? (YES/NO) | IF SO, PRO/CON |
|---|---|---|---|---|---|---|
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT<br>Jim Jacobi | WACO | STREET<br>CITY<br>ZIP | 753-7319 | | If necessary | PRO Amend-ment |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
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| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |

MITTEE Social + Health Services
TE 2-25-86

PUBLIC
ATTENDANCE ROSTER

ESSB 4683 - Death Penalty

| NAME | ORGANIZATION | MAILING ADDRESS | PHONE | BILL OR SUBJECT OF INTEREST | WISH TO TESTIFY? (YES/NO) | IF SO, PRO/CON |
|---|---|---|---|---|---|---|
| PLEASE PRINT<br>JERRY SHEEHAN | ACLU | STREET 1730 Smith Tower<br>CITY<br>ZIP Seattle 98104 | | | YES | CON |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |
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| PLEASE PRINT | | STREET<br>CITY<br>ZIP | | | | |

TESTIMONY OF
GERARD JOHN SHEEHAN
LEGISLATIVE DIRECTOR
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Substitute Senate Bill 4683

House of Representatives
Social and Health Services Committee
25 February 1986

**American Civil Liberties Union of Washington and**
**American Civil Liberties Union of Washington Foundation**

1720 Smith Tower
Seattle, Washington 98104
206/624-2184
1-800/348-8810

Good morning Chairman Brekke. My name is Jerry Sheehan and I am the Legislative Director for the American Civil Liberties Union of Washington. ACLU-W's position on government killing its own citizens is that it is constitutionally wrong. As public policy, it is our position that it is wrong to kill people in order to teach that it is wrong to kill.

SSB 4683 removes from Washington law the name of the drug which will be used to kill a person under a sentence of death. I urge you to reject this proposal. To remove the name of the drug to be used to take the life of a Washingtonian is to conceal from public scutiny and legislative oversight a crucial piece of the state killing process. I believe the Legislature would be abdicating its responsibility(as the policy making branch of government)to know how the Department of Corrections is planning for the killing to take place.if it approves a bill which, in effect, makes secret the death drug. Neither you nor the public will know what substances are being used to bring about these judicially approved deaths. In as serious a matter as state killing I believe we all, legislator and citizen, have a duty to know exactly what is being done in our name, and by what means.

If the DOC does not wish to have state law only stipulate sodium thiopental as the killing drug, then the DOC should request specific additions or substitutes for inclusion in statute. But DOC should not ask the Legislature for its signature on a blank prescription for the Department to fill in at its discretion. DOC should be asked what drug it would like to use, if their personnel had to kill someone next week, and then add that

drug to the statute.

SSB 4683 also removes the requirement that the death be "pronounced by a licensed physician" and instead, calls for the services of a "medical examiner or coroner". ACLU-W believes it is incumbent on the state to require that a medically qualified professional attend the victim. One would want to be absolutely certain that the person receiving the poison is dead so as to avoid disconnecting the intravenous drip prematurely and to avoid cutting the person down from the hanging rope before they are fully strangled.

I respectfully urge you to reject SSB 4683.

ENGROSSED SUBSTITUTE SENATE BILL NO. 4683

State of Washington 49th Legislature 1986 Regular Session

by Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Read first time 1/24/86.

AN ACT Relating to the death penalty; and amending RCW 10.95.180. BILL8

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: 5

Sec. 1. Section 18, chapter 138, Laws of 1981 and RCW 10.95.180 SB are each amended to read as follows: 1-468

(1) The punishment of death shall be supervised by the 3;2 superintendent of the penitentiary and shall be inflicted either by PARTA hanging by the neck ((~~until--death--is--pronounced--by--a--licensed physician~~)) ;1 or, 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~~)) intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead. Death shall be pronounced by the medical examiner or coroner of the county in which the execution takes place. 12 14 15 16 17 17 19

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary. 20 21

# FINAL BILL REPORT

## SSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

House Committee on Social & Health Services

## AS PASSED LEGISLATURE

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

VOTES ON FINAL PASSAGE:

| | | | |
|---|---|---|---|
| Senate | 44 | 0 | |
| House | 81 | 15 | (House amended) |
| Senate | 43 | 2 | (Senate concurred) |

EFFECTIVE: 90 days after adjournment of 1986 Regular Session

Appropriation: _____
Revenue: _____
Fiscal Note: No Impact.

# HOUSE BILL REPORT

## ESSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

House Committee on Social & Health Services

Majority Report: Do pass with amendment. (11)
Signed by Representatives Brekke, Chair; Day, Vice Chair; Armstrong, Ballard, Bond, Braddock, Brooks, Dobbs, Padden, Scott and Tanner.

Minority Report: Do not pass. (4)
Signed by Representatives Dellwo, Leonard, Lux and Winsley.

House Staff: Jean Wessman (786-7132)

AS REPORTED BY COMMITTEE ON SOCIAL & HEALTH SERVICES
FEBRUARY 25, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

BILL AS AMENDED: A specific drug, sodium thiopental, is deleted as the drug for use in carrying out the death sentence and replaced by the generic phrase of a substance sufficient to cause death. Death must be pronounced by a licensed physician after the sentence of death is carried out either by hanging or lethal injection.

AMENDED BILL COMPARED TO ENGROSSED BILL: The requirement of a licensed physician to pronounce death is restored and medical examiner deleted.

Fiscal Note: No Impact.

House Committee - Testified For Original Measure in Committee: John King, Department of Corrections; and Jim Goche, Washington Association of County Officials.

House Committee - Testified Against Original Measure in Committee: Jerry Sheehan, American Civil Liberties Union.

House Committee - Testimony For: The currently named drug causes severe convulsions when used. It is requested that a specifically named drug be deleted in order that the Department may take advantage of the latest advances in drugs used for this purpose.

House Committee - Testimony Against: No change should be made to a statute that is objectionable in its totality. The state should be aware of what drug is being used for a lethal injection in such an important area.

# SENATE BILL REPORT

## ESSB 4683

BY Senate Committee on Human Services & Corrections (originally sponsored by Senators Rasmussen, Owen, Deccio and Metcalf; by request of Department of Corrections)

Revising provisions relating to the death penalty.

Senate Committee on Human Services & Corrections

Senate Hearing Date(s): January 22, 1986; January 23, 1986

Majority Report: That Substitute Senate Bill No. 3683 be substituted therefor, and the substitute bill do pass.
Signed by Senators Wojahn, Chairman; Kreidler, Vice Chairman; Conner, Craswell, Deccio, Granlund, Johnson, Kiskaddon, McDonald, Peterson.

Senate Staff: Vicki Fabre (786-7747); Louise Bray Nash (786-7452)
February 19, 1986

## AS PASSED SENATE, FEBRUARY 16, 1986

BACKGROUND:

Currently, the law authorizes the superintendent of the penitentiary to implement a sentence of death by either hanging the defendant by the neck until death is pronounced by a licensed physician or, at the election of the defendant, administration of a lethal dose of sodium thiopental.

Actual experience of other states utilizing sodium thiopental indicates that it could cause massive, prolonged convulsions.

SUMMARY:

The superintendent of the penitentiary is authorized, if the defendant so elects, to inflict the punishment of death by intravenous injection of a lethal dose of a substance sufficient to cause death.

The medical examiner or coroner of the county in which the execution takes place shall pronounce the defendant's death.

Fiscal Note: available

Senate Committee - Testified: John King, DOC; Kip Kautzky, Director, Division of Prisons, DOC; Bob Stalker, Evergreen Legal Services; Carol

Smith, Assistant Attorney General, DOC; Kathy Spong, Assistant Attorney General, DOC

# HOUSE OF REPRESENTATIVES

*Olympia, Wash.*

## ROLL CALL VOTE

BILL NO. ESSB 4683

DATE: 2-25-86

Committee on Social and Health Services (17)

VOTING ON:

Final Passage DPA

(DP, DPA, DPS, DP2S)

| MEMBER | AYE | NAY | ABSENT = A<br>EXCUSED = E | NOT VOTING | CHANGE VOTE |
|---|---|---|---|---|---|
| BREKKE, Chair | 12 | | | | |
| DAY, Vice-Chair | 1 | | | | |
| ARMSTRONG | 2 | | | | |
| BALLARD | 3 | | | | |
| BOND | 4 | | | | |
| BRADDOCK | 5 | | | | |
| BROOKS | 6 | | | | |
| DELLWO | | 1 | | | |
| DOBBS | 7 | | | | |
| LEONARD | | 2 | | | |
| LEWIS | 8 | | | | |
| LUX | | 3 | | | |
| PADDEN | 9 | | | | |
| SCOTT | 10 | | | | |
| TANNER | 11 | | | | |
| WEST | | | E | | |
| WINSLEY | | 4 | | | |
| TOTAL | 12 | 4 | 1E | | |
| Change Vote | - | - | | | |
| TOTAL | 12 | 4 | | | |

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

February 25, 1986
(date)

Engrossed Substitute Senate Bill No. 4683
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* Committee on Human Services & Corrections

Revising provisions relating to the death penalty.
(Type in brief title exactly as it appears on back cover of original bill)

*reported by Committee on* Social and Health Services (17)

☐ *MAJORITY recommendation: Do Pass.*

☐ *MAJORITY recommendation: The substitute bill be substituted therefor and the substitute bill do pass.*

☒ *MAJORITY recommendation: Do pass with the following amendment(s):*

ESSB 4683 - H Comm Amd
By Committee on Social and Health Services

On page 1, line 12, after "dead." strike the remaining language in subsection (1) and insert "In any case, death shall be pronounced by a licensed physician."

*Signed by*

*Representatives* (11)

BRekke — Chairman
DAY — Vice Chairman
ARMSTRONG
BALLARD
BOND
BRADDOCK
BROOKS
~~DELLINO~~
DOBBS
~~LEONARD~~
~~LEWIS~~
~~LUX~~
PADDEN
SCOTT
TANNER
~~WEST~~
~~WINSLEY~~

# Report of Standing Committee

**HOUSE OF REPRESENTATIVES**
*Olympia, Washington*

February 25, 1986
(date)

Engrossed Substitute Senate Bill No. 4683
(Type in House or Senate Bill, Resolution, or Memorial)

*Prime Sponsor* Committee on Human Services & Corrections

Revising provisions relating to the death penalty.
(Type in brief title exactly as it appears on back cover of original bill)

*reported by Committee on* Social and Health Services (17)

*MINORITY recommendation:* Do not pass.

*Signed by*
*Representatives* (4)

~~BREGES~~ *Chairman*
~~BAX~~ *Vice Chairman*
~~ARMSTRONG~~
~~BALLARD~~
~~BOND~~
~~BRADDOCK~~
~~BROOKS~~
DELLWO
~~DORIS~~
LEONARD
~~LEWIS~~
LUX

~~PADDEN~~
~~SCOTT~~
~~TANNER~~
~~WEST~~
WINSLEY

TESTIMONY OF
GERARD JOHN SHEEHAN
LEGISLATIVE DIRECTOR
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Substitute Senate Bill 4683

House of Representatives
Social and Health Services Committee
25 February 1986

**American Civil Liberties Union of Washington and**
**American Civil Liberties Union of Washington Foundation**

1720 Smith Tower
Seattle, Washington 98104
206/624-2184
1-800/348-8810

Good morning Chairman Brekke. My name is Jerry Sheehan and I am the Legislative Director for the American Civil Liberties Union of Washington. ACLU-W's position on government killing its own citizens is that it is constitutionally wrong. As public policy, it is our position that it is wrong to kill people in order to teach that it is wrong to kill.

SSB 4683 removes from Washington law the name of the drug which will be used to kill a person under a sentence of death. I urge you to reject this proposal. To remove the name of the drug to be used to take the life of a Washingtonian is to conceal from public scutiny and legislative oversight a crucial piece of the state killing process. I believe the Legislature would be abdicating its responsibility(as the policy making branch of government)to know how the Department of Corrections is planning for the killing to take place.if it approves a bill which, in effect, makes secret the death drug. Neither you nor the public will know what substances are being used to bring about these judicially approved deaths. In as serious a matter as state killing I believe we all, legislator and citizen, have a duty to know exactly what is being done in our name, and by what means.

If the DOC does not wish to have state law only stipulate sodium thiopental as the killing drug, then the DOC should request specific additions or substitutes for inclusion in statute. But DOC should not ask the Legislature for its signature on a blank prescription for the Department to fill in at its discretion. DOC should be asked what drug it would like to use, if their personnel had to kill someone next week, and then add that

drug to the statute.

SSB 4683 also removes the requirement that the death be "pronounced by a licensed physician" and instead, calls for the services of a "medical examiner or coroner". ACLU-W believes it is incumbent on the state to require that a medically qualified professional attend the victim. One would want to be absolutely certain that the person receiving the poison is dead so as to avoid disconnecting the intravenous drip prematurely and to avoid cutting the person down from the hanging rope before they are fully strangled.

I respectfully urge you to reject SSB 4683.

# FISCAL NOTE

REQUEST NO.

| | |
|---|---|
| BILL NO. Z1054/86 SSB 4683 | RESPONDING AGENCY Department of Corrections |
| TITLE ACT RELATING TO THE DEATH PENALTY | PREPARED BY Edward M. Simko, Jr. — DATE January 15, 1986 |
| | TITLE Comptroller Div. Management & Budget — SCAN 234-5491 |
| | REVIEWED BY OFM Denise Hutton — DATE 1/21/86 |

Fiscal impact of the above legislation on Washington State government is estimated to be:

☒ NONE

☐ AS SHOWN BELOW

Figures in parentheses represent reductions. Detail supporting these estimates is contained in Form FN-2.

**REVENUE TO:** First Biennium 19 85 — 19 87

| FUND | CODE | SOURCE TITLE | CODE | 1ST YEAR | 2ND YEAR | TOTAL | FIRST SIX YEARS |
|---|---|---|---|---|---|---|---|
| GENERAL FUND — STATE | 001 | | | | | | |
| GENERAL FUND — FEDERAL | 001 | | | | | | |
| OTHER * | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | TOTALS | | | | |

**EXPENDITURES FROM:**

| FUND | CODE | | | |
|---|---|---|---|---|
| GENERAL FUND — STATE | 001 | | | |
| GENERAL FUND — FEDERAL | 001 | NO FISCAL IMPACT | | |
| OTHER * | | | | |
| | | | | |
| | | | | |
| | | | | |
| | TOTALS | | | |

* Itemize all other including non-appropriated funds and/or accounts within the General Fund.

**EXPENDITURES BY OBJECT OR PURPOSE:**

| | | | |
|---|---|---|---|
| FTE STAFF YEARS | | | |
| SALARIES AND WAGES | | | |
| PERSONAL SERVICE CONTRACTS | | | |
| GOODS AND SERVICES | | | |
| TRAVEL | NO FISCAL IMPACT | | |
| EQUIPMENT | | | |
| EMPLOYEE BENEFITS | | | |
| GRANTS AND SUBSIDIES | | | |
| INTERAGENCY REIMBURSEMENT | | | |
| DEBT SERVICE | | | |
| CAPITAL OUTLAYS | | | |
| TOTALS | | | |

Check this box if the above legislation has cash flow impact per instructions: ☐
Show cash flow impact on FN-2.

Check this box if the above legislation has fiscal impact on local governments: ☐
Do not include local government impact on FN-1.

Form FN-1 (Rev. 12/82) 5/10

# FISCAL NOTE

Department of Corrections
Responding Agency

Code No.

REQUEST NUMBER

Bill No. Z1054/86

January 15, 1986
Date Submitted

This proposal is to amend RCW 10.95.160-190 to allow the use of modern up-to-date lethal solutions rather than limit the choice to sodium thiopental. The fiscal impact for this provision would be negligible, if any, for the administering of lethal solutions other than sodium thiopental.

# APPENDIX 19

HUMAN RIGHTS WATCH

April 2006 Volume 18, No. 1(G)

# So Long as They Die
## Lethal Injections in the United States

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## Summary

*We didn't discuss pain and suffering.*

—William Henry Lloyd, Tennessee Department of Corrections lethal injection protocol committee member[1]

Compared to electrocution, lethal gas, or hanging, death by lethal injection appears painless and humane, perhaps because it mimics a medical procedure. More palatable to the general public, lethal injection has become the most prevalent form of execution in the United States. Thirty-seven of the thirty-eight death penalty states and the federal government have adopted it; for nineteen states, it is the only legal method of execution.

In the standard method of lethal injection used in the United States, the prisoner lies strapped to a gurney, a catheter with an intravenous line attached is inserted into his vein, and three drugs are injected into the line by executioners hidden behind a wall. The first drug is an anesthetic (sodium thiopental), followed by a paralytic agent (pancuronium bromide), and, finally, a drug that causes the heart to stop beating (potassium chloride).

Although supporters of lethal injection believe the prisoner dies painlessly, there is mounting evidence that prisoners may have experienced excruciating pain during their executions. This should not be surprising given that corrections agencies have not taken the steps necessary to ensure a painless execution. They use a sequence of drugs and a method of administration that were created with minimal expertise and little deliberation three decades ago, and that were then adopted unquestioningly by state officials with no medical or scientific background. Little has changed since then. As a result, prisoners in the United States are executed by means that the American Veterinary Medical Association regards as too cruel to use on dogs and cats.

Human Rights Watch opposes capital punishment in all circumstances. But until the thirty-eight death penalty states and the federal government abolish the death penalty, international human rights law requires them to use execution methods that will produce the least possible physical and mental suffering. It is not enough for public officials to believe that lethal injection is inherently more humane than the electric chair. States must choose carefully among possible drugs and administration procedures to be sure they

[1] Deposition, *Abdur'Rahman v. Sundquist*, et al., Case. No. 02-2236-III, April 4, 2003, p. 28.

have developed the specific protocol that will reduce, to the greatest extent possible, the prisoner's risk of mental or physical agony.

The history of lethal injection executions in the United States reveals no such care on the part of state legislators and corrections officials. The three-drug sequence was developed in 1977 by an Oklahoma medical examiner who had no expertise in pharmacology or anesthesia and who did no research to develop any expertise. Oklahoma's three-drug protocol was copied by Texas, which in 1982 was the first state to execute a man by lethal injection. Texas's sequence was subsequently copied by almost all other states that allow lethal injection executions. Drawing on its own research and that of others, Human Rights Watch has found no evidence that any state seriously investigated whether other drugs or administration methods would be "more humane" than the protocol it adopted.

Corrections agencies continue to display a remarkable lack of due diligence with regard to ascertaining the most "humane" way to kill their prisoners. Even when permitted by statute to consider other drug options, they have not revised their choice of lethal drugs, despite new developments in and knowledge about anesthesia and lethal chemical agents. They continue to use medically unsound procedures to administer the drugs. They have not adopted procedures to make sure the prisoner is in fact deeply unconscious from the anesthesia before the paralyzing second and painful third drugs are administered.

Each of the three drugs, in the massive dosages called for in the protocols, is sufficient by itself to cause the death of the prisoner. Within a minute after it enters the prisoner's veins, potassium chloride will cause cardiac arrest. Without proper anesthesia, however, the drug acts as a fire moving through the veins. Potassium chloride is so painful that the American Veterinary Medical Association prohibits its use for euthanasia unless a veterinarian establishes that the animal being killed has been placed by an anesthetic agent at a deep level of unconsciousness (a "surgical plane of anesthesia" marked by non-responsiveness to noxious stimuli).

Pancuronium bromide is a neuromuscular blocking agent that paralyzes voluntary muscles, including the lungs and diaphragm. It would eventually cause asphyxiation of the prisoner. The drug, however, does not affect consciousness or the experience of pain. If the prisoner is not sufficiently anesthetized before being injected with pancuronium bromide, he will feel himself suffocating but be unable to draw a breath—a torturous experience, as anyone knows who has been trapped underwater for even a few seconds. The pancuronium bromide will conceal any agony an insufficiently

anesthetized prisoner experiences because of the potassium chloride. Indeed, the only apparent purpose of the pancuronium bromide is to keep the prisoner still, saving the witnesses and execution team from observing convulsions or other body movements that might occur from the potassium chloride, and saving corrections officials from having to deal with the public relations and legal consequences of a visibly inhumane execution. At least thirty states have banned the use of neuromuscular blocking agents like pancuronium bromide in animal euthanasia because of the danger of undetected, and hence unrelieved, suffering.

Sodium thiopental is the only drug with anesthetic properties used in lethal injections. State protocols specify a dosage of sodium thiopental five to twenty times greater than what would be used in surgery. If this amount of sodium thiopental is administered properly, the prisoner will go limp, stop breathing, and lose consciousness within a minute. The prisoner will not feel the suffocating effects of pancuronium bromide or the agony of potassium chloride. If someone trained to establish and maintain intravenous lines, induce anesthesia, and monitor consciousness were present and involved in the lethal injection execution, the pain the prisoner would feel is the insertion of catheters into his veins. But lethal injection protocols do not include measures to ensure the anesthesia is quickly and effectively administered.

Administering drugs intravenously requires extensive training to ensure that the proper intravenous access is secured with minimal pain, and that it is then maintained. Inserting an intravenous catheter can be particularly difficult when the recipient has veins compromised by drug use—not uncommon among prisoners—and constricted by anxiety. Witnesses have described execution personnel poking repeatedly at prisoners trying to find a good vein.

Standard medical procedures for intravenous administration of anesthesia during surgery require that the equipment and the patient be monitored continuously by someone at the patient's side. Yet during lethal injection executions, the execution personnel are behind a wall and window, separated by many feet from the prisoner. Most significantly, standard medical procedures require a determination of the level of anesthesia before surgery begins and throughout the procedure. During lethal injection executions, the drugs are administered one after the other as quickly as the executioners can push the syringe plungers into the intravenous equipment. There is no person trained in the administration of anesthetics and the assessment of anesthetic depth present to ensure the prisoner is appropriately and continuously anesthetized before the second and third drugs are administered and throughout the execution; nor do execution team members use equipment that could determine the condemned inmate's level of consciousness.

Lawyers for condemned prisoners, medical and veterinary anesthesiologists, and others have suggested modifications to current lethal injection protocols that would minimize the risk of pain and suffering currently posed. They advise, for example, having a trained technician give the prisoner a single lethal injection of the painless barbiturate pentobarbital, a method that would eliminate the risks from using paralyzing or painful chemical agents. It is noteworthy that in Oregon, the only state that has legalized physician-assisted suicide, doctors prescribe an overdose of pentobarbital or a similar barbiturate for their terminally ill patients. When veterinarians euthanize animals, they also use a single massive dose of a barbiturate. Another alternative proposed by prisoners' lawyers and anesthesiologists is that officials who insist on using the three-drug sequence take steps to ensure the effectiveness of the anesthesia, e.g., by having present at the execution someone who is trained in anesthesiology and can assess the prisoner's level of consciousness before other drugs are injected and until the prisoner has died.

Because of our opposition to the death penalty, Human Rights Watch does not endorse any methods of lethal injection—either the current or proposed alternatives. We do insist, however, that states make a concerted effort to ensure they have chosen the method of executing their prisoners that meets the international human rights standard of risking the least possible pain and suffering of the inmate.

It is difficult to understand why corrections officials keep following protocols which were not sound when originally developed, and which advances in pharmacology and anesthesia administration have rendered archaic at best, torturous at worst. The only advantage of current protocols is that they yield executions that are relatively quick and appear painless—whatever the reality. As such, the current method is easier for witnesses to the execution as well as for the executioners. It also spares someone from having to be at the prisoner's side while he is being killed. An anesthesiologist who has served as an expert witness in litigation for corrections agencies has observed, "The people who are thinking about these things are not thinking about the inmate."

The risks of pain and suffering faced by prisoners from the current lethal injection protocol are not just hypothetical. There is mounting evidence, including execution records and eyewitness testimony, of botched executions. At least some prisoners may have been insufficiently anesthetized during their executions, experiencing pain but unable to signal their distress, because they were paralyzed. There have been executions where:

- For over an hour, medical technicians and then a physician tried to find a suitable vein for intravenous access. The condemned inmate ended up with one needle in his hand, one in his neck, and a catheter inserted into the vein near his collarbone. One hour and nine minutes after he was strapped to the gurney, the prisoner was pronounced dead.

- A kink in the intravenous tubing stopped some of the drugs from reaching an inmate. In the same execution, the intravenous needle was inserted pointing the wrong way—towards the inmate's fingers instead of his heart, which slowed the effect of the drugs.

- A prisoner who initially lost consciousness during his lethal injection execution began convulsing, opened his eyes, and appeared to be trying to catch his breath while his chest heaved up and down repeatedly. This lasted for approximately ten minutes before his body stopped twitching and thrashing on the gurney.

In six lethal injection executions in California, the condemned inmates' chests were moving up and down several minutes after the administration of the anesthetic, indicating that the inmates may not have been anesthetized deeply enough to avoid experiencing the painful effects of the potassium chloride and that the paralyzing effects of the pancuronium bromide might have prevented them from showing pain.

There have been at least forty-one cases before state and federal courts challenging the constitutionality of lethal injection protocols. No court has ever ruled lethal injection executions unconstitutional; many of the cases have been dismissed on procedural grounds without a full evidentiary hearing.

In two recent cases in California and North Carolina, federal courts have been sufficiently troubled by new evidence of possible problems with lethal injection executions that they ordered corrections officials to change their lethal injection procedures in particular ways, or the executions would be stayed. In both cases, the courts proposed the presence throughout the execution of someone trained in anesthesia. In the California case, the court also suggested the option of injecting the condemned prisoner, Michael Morales, with a single massive dose of a barbiturate. The California Department of Corrections rejected the use of a single barbiturate and was not able to find anesthesiologists willing to monitor the prisoner's level of anesthesia and to make adjustments as necessary for the three-drug protocol execution. The court stayed the prisoner's execution and scheduled an evidentiary hearing on California's

lethal injection protocols for May 2 to 3, 2006. As of April 10, 2006, North Carolina has not responded to the court order in its case. On April 26, the U.S. Supreme Court will hear oral arguments about the procedures a prisoner must use to challenge the constitutionality of a lethal injection protocol.

California's inability to find anesthesiologists to participate in the execution of Morales highlights the limits medical ethics place on the participation of medical professionals in executions. Indeed, it was the growing practice of lethal injection executions that prompted the medical community to clarify and solidify its position that physician participation in executions violates the ethical precepts of the profession. The American Medical Association (AMA) defines the prohibited participation to include monitoring vital signs; attending or observing as a physician; rendering technical advice regarding executions, selecting injection sites; starting intravenous lines; prescribing, preparing, administering, or supervising the injection of drugs; inspecting or testing lethal injection devices; and consulting with or supervising lethal injection personnel. Heeding these guidelines, even doctors who work for corrections agencies have refused to participate in the development of lethal injection protocols or their use. Nevertheless, despite the AMA's clear stance, some physicians ignore the ethical guidelines and offer their help during lethal injection executions.

Human Rights Watch recognizes that medical ethics restricts the way states can conduct lethal injection executions. This is a dilemma of the states' making—by their refusal to abolish capital punishment—and it is a dilemma states must resolve while heeding their human rights responsibilities, if they continue to use lethal injection executions.

Until recently, the United States was the only country in the world that used lethal injection as an execution method. Several other countries that have not yet abolished the death penalty have followed: China started using lethal injection in 1997; Guatemala executed its first prisoner by lethal injection in 1998; and the Philippines and Thailand have had lethal injection execution laws in place since 2001 (although to date, they have not executed anyone by this method).

## Recommendations

Human rights law is predicated on recognition of the inherent dignity and the equal and inalienable rights of all people, including even those who have committed terrible crimes. It prohibits torture and other cruel, inhuman or degrading punishment. Human Rights Watch believes these rights cannot be reconciled with the death penalty, a form of punishment unique in its cruelty and finality, and a punishment inevitably and universally plagued with arbitrariness, prejudice, and error. Thus our first recommendation is that states and the federal government abolish the death penalty. If governments do not choose to abolish capital punishment, they must still heed human rights principles by ensuring their execution methods are chosen and administered to minimize the risk a condemned prisoner will experience pain and suffering. As state lethal injection protocols have never been subjected to serious medical and scientific scrutiny, Human Rights Watch recommends that each state suspends its lethal injection executions until it has convened a panel of anesthesiologists, pharmacologists, doctors, corrections officials, prosecutors, defense attorneys, and judges to determine whether or not its lethal injection executions as currently practiced are indeed the most humane form of execution.

### *To State and Federal Corrections Agencies*

- Review lethal injection protocols by soliciting input from medical and scientific experts, and by holding public hearings and seeking public comment.
- Stop using drugs that do not minimize the pain and suffering of the condemned inmate. Ensuring the comfort of witnesses and the executioners should not be a determining factor in which drugs are chosen for lethal injections. More specifically, discontinue the use of pancuronium bromide or any other neuromuscular blocking agent, because it masks any pain and suffering endured by the inmate. Replace potassium chloride with drugs that do not cause excruciating pain.
- Anesthesia must be used in all lethal injections that involve painful or paralyzing drugs. If anesthesia is used, ensure that trained personnel are present and able to monitor the prisoner's consciousness to ensure he is deeply and fully anesthetized before any subsequent painful drugs are administered. Such personnel would stand beside the prisoner throughout the execution.
- Keep, retain, and make publicly available execution records, including execution logs, autopsy reports, and toxicology reports.
- Conduct periodic reviews of lethal injection protocols to ensure they reflect medical and pharmacological developments.

### *To State Legislators and the U.S. Congress*

- Abolish the death penalty.
- If the death penalty is not abolished, suspend all lethal injection executions until each state convenes a blue ribbon panel of medical, scientific, legal, judicial, and correctional experts authorized to review and recommend changes to lethal injection execution protocols as necessary to ensure the protocol adopted causes the inmate the least possible pain and suffering.
- Require corrections departments to adopt the method of execution, including the specific method of lethal injection, that causes the inmate the least possible pain and suffering.

## I. Development of Lethal Injection Protocols

*It wasn't a medical decision. It was based on the other states that had all used a similar dose.*

—Donald Courts, pharmacy director at Louisiana State Penitentiary, explaining how Louisiana chose the specific chemicals and dosage amounts for its lethal injection protocol[2]

*The only thing that mattered was that the guy ended up dead. . . . [The warden] wasn't worried too much about the amount of medicine. He had certainly used the same types of medicine, but . . . he wasn't totally concerned about the amounts of what it may or may not do. They ended up dead, and that's all he was worried about.*

—Annette Viator, former chief legal counsel for Louisiana State Penitentiary, explaining her discussion with a Texas warden regarding the drugs used during Texas's lethal injection executions[3]

Different methods of execution have succeeded one another throughout the twentieth century in the United States, as changing public opinion and sensitivities has led public officials to reject older methods in favor of newer ones. At the time of their introduction, the electric chair and lethal gas were both touted as more humane forms of execution compared to earlier methods.[4] Each, however, proved cruel. Electrocution, in particular, shocked witnesses when, for example, prisoners erupted in flames.[5]

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[2] Special Hearing, *Code v. Cain*, Case No. 138,860-A, February 11, 2003, Vol. II, p. 33.

[3] Special Hearing, *Louisiana v. Code*, Case No. 138,860, March 18, 2003, Vol. II, p. 58-59.

[4] Concerns over the barbarity of hanging led states to change their method of execution from hanging to electrocution. Even though the first electrocution executions were terribly botched, by 1913, thirteen states had changed to electrocution because of "a well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915) (noting the adoption of electrocution by eleven states following the decision by a New York commission that it was more humane). See generally Craig Brandon, *The Electric Chair: An Unnatural American History* (New York: McFarland & Company, 1999), p. 67-88. By 1949, twenty-six states had changed to electrocution. After numerous electrocution botches, states began rejecting electrocution execution methods in favor of lethal gas. Nevada was the first state to adopt lethal gas executions, in 1921. In an attempt to make lethal gas executions more humane, the Nevada legislature passed a law providing that lethal gas would be administered "without warning and while [the inmate was] asleep in his cell." See William J. Bowers, Glenn L. Pierce, and John F. McDevitt, *Legal Homicide: Death as Punishment in America, 1864-1982* (Boston: Northeastern University Press, 1984), p. 12. In *State v. Gee Jon*, the Nevada Supreme Court emphasized that the legislature "sought to provide a method of inflicting the death penalty in the most humane manner known to modern science." 211 P. 676, 682 (Nevada 1923).

[5] On August 10, 1982, Virginia executed Frank J. Coppola by electrocution. An attorney who was present stated that it took two fifty-five-second jolts to kill Coppola. During the second jolt, Coppola's head and leg caught on fire, and the room smelled like smoke and burning flesh. Deborah W. Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century," *William and Mary Law Review,* 1994, p. 551, 664-665. On July 8, 1999, Florida executed Allen Lee Davis by electrocution. Davis's

In the late 1970s, states turned to lethal injection, believing this was both a less expensive as well as a more humane way to kill condemned inmates.[6] In 1977, Oklahoma legislators passed the first lethal injection statute.[7] Texas passed a lethal injection statue the next day.[8] By 1981, five states had adopted lethal injection statutes.[9] Today, thirty-seven of the thirty-eight death penalty states have lethal injection statutes.[10] In nineteen states, lethal injection is the only method of execution allowed.[11]

States in the United States rely almost solely on lethal injections to execute condemned inmates. All twelve executions to date (as of April 1, 2006) have been by lethal injection, as were all sixty in 2005.[12] Of the 1,016 executions in the United States since the death

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body was lit on fire during the electrocution. His face, body, and head were deeply burned. During the execution, Davis's face became red, and he tried to get the guard's attention by making noises that witnesses described as "screams," "yells," "moans," "high-pitched murmurs," "squeals," or "groans." Brief for Petitioner, *Bryan v. Moore*, 528 U.S. 960 (1999), p. 3 (citations omitted). "Before he was pronounced dead ... the blood from his mouth had poured onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even oozing through the buckle holes on the leather chest strap holding him to the chair." "Davis Execution Gruesome," *Gainesville Sun*, July 8, 1999, p. A1. Davis's execution was the first in Florida's new execution chair, built especially to accommodate his 350-pound frame. Later, Florida Supreme Court Justice Leander Shaw said, "The color photos of Davis depict a man who—for all appearances—was brutally tortured to death by the citizens of Florida." *Provenzo v. State*, 744 So.2d 413, 440 (Florida 1999).

[6] Deborah Denno, "Lethally Humane?" *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, James R. Acker, Robert M. Bohm, and Charles S. Lanier, eds. (Durham: Carolina Academic Press, 2003), p. 711. E.g., in 1981, several years after Oklahoma became the first state to adopt lethal injection, a spokesperson for the Oklahoma Corrections Department confirmed that the state changed from the electric chair to lethal injection for "humane" reasons: "People don't realize it, but the electric chair can take 11 minutes to kill people. The first shock knocks you unconscious, but then it would just cook you. You would literally fry." Mary Thornton, "Death By Injection," *Washington Post*, October 6, 1981, p. A1. "Being a former farmer and horse trainer, I know what its like to try to eliminate an injured horse by shooting him . . . Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep—that's it. I myself have wondered if maybe this isn't part of our problem [with capital punishment], if maybe we should review and see if there aren't even more humane methods now—the simple shot or tranquilizer." Henry Scharzschild, "Homicide by Injection," *New York Times,* December 23, 1982, p. A15 (quoting Ronald Reagan). On National Public Radio's *Talk of the Nation*, aired February 23, 2006, State Senator David Ralston, a Republican from Georgia, stated: "I know other states debated the propriety of using electrocution and our Supreme Court here in 2001 decided that that was a cruel and inhumane form of punishment. The legislature in response to that adopted what was becoming more accepted, and that was the lethal injection." See *Talk of the Nation* Transcript, http://www.npr.org/templates/story/story.php?storyId=5230227 (retrieved April 13, 2006) (copy on file at Human Rights Watch).

[7] Human Rights Watch telephone interview with Dr. Jay Chapman, former Oklahoma chief medical examiner, Santa Rosa, California, March 23, 2006.

[8] See Vince Beiser, "A Guilty Man," *Mother Jones*, September/October 2005, http://www.motherjones.com/news/feature/2005/09/guiltyman.html (retrieved March 30, 2006). See also Death Penalty Information Center (DPIC), "Execution Database," http://www.deathpenaltyinfo.org/getexecdata.php (retrieved March 31, 2006).

[9] DPIC, "Execution Database."

[10] Nebraska is the only state that requires execution by electrocution. DPIC, "Methods of Execution," http://www.deathpenaltyinfo.org/article.php?scid=8&did=245 (retrieved March 31,.2006).

[11] See Appendix A for a list of states, which allow the death penalty, and the methods of execution allowed.

[12] DPIC, "Methods of Execution."

penalty was reinstated in 1976, 848 were by lethal injection—three by the federal government and the rest by states.[13] At the start of 2006, there were 3,373 prisoners on death row—3,363 of whom face the possibility of a lethal injection execution.[14]

The statutes of fifteen states use language similar to Oklahoma's, requiring the use of a "lethal quantity of an ultra-short acting barbiturate or other similar drug in combination with a chemical paralytic to cause death."[15] It is not clear if the legislators intended the prisoner to die from the anesthetic or from the asphyxiation caused by the paralytic agent, or both. According to Dr. Jay Chapman, the architect of Oklahoma's two-drug statute, he "didn't care which drug killed the prisoner, as long as one of them did."[16] Thirteen states refer to an injection of a "substance or substances in a quantity to cause death" or language very close to that wording.[17] Seven states provide simply for the use of "lethal injection" executions.[18] Two state statutes use slightly different language from all the rest.[19] Only one state statute mandates corrections officials to choose among lethal injection options to find the most humane procedure possible.[20] Despite the variations in state statutory language authorizing lethal injections, thirty-six state corrections agencies today use the same three-drug sequence of sodium thiopental, pancuronium bromide and potassium chloride in their lethal injection drug protocols.[21]

No state statute prescribes drug dosages and the specific methods of administration; legislators have left these decisions to corrections officials. Nor does any state statute prescribe the manner of intravenous line access, the certification or training required for those who participate in executions, or other details concerning the administration of the

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[13] Ibid.

[14] Criminal Justice Project, NAACP Legal Defense Fund, *Death Row USA*, January 1, 2006, http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf (retrieved April 13, 2006).

[15] These fifteen states with two-drug statutes are: Arkansas, Idaho, Illinois, Maryland, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Wyoming.

[16] Interview with Chapman.

[17] These thirteen states with statutes that refer generally to "substances" or "drugs" sufficient to cause death are: Arizona, California, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, New York, Ohio, Texas, and Washington.

[18] These seven states with simple "lethal injection" statutes are: Alabama, Florida, Missouri, South Carolina, Tennessee, Utah, Virginia.

[19] These two states are Colorado and Nevada. See Colorado Review Statute Section 16-11-401 ("sodium thiopental or other equally or more effective substance sufficient to cause death"); Nevada Review Statute Annotated Section 176.355(1) ("a lethal drug").

[20] In Kansas, the statute reads: "The mode of carrying out a sentence of death in this state shall be by *intravenous injection of a substance or substances in a quantity sufficient to cause death in a swift and humane manner.*" Kansas Criminal Procedure Code Section 22-4001.

[21] The "two drug" statutes do not expressly prohibit the use of additional drugs, so the correction agencies were able to adopt three-drug protocols.

drugs or monitoring of the procedures.[22] Legislators have given correctional agencies the authority "to promulgate necessary rules and regulations to facilitate the implementation of execution by lethal injection."[23] For example, in Florida the legislature did not specify how death by lethal injection would be accomplished, but left this decision up to the Department of Corrections, "because it has personnel better qualified to make such determinations."[24]

The public record offers scant insight into the basis on which state legislatures that chose specific lethal injection drugs did so. An analysis of state statutes and legislative histories provides no evidence that legislatures—other than possibly Oklahoma—relied on, or even sought input from, medical and scientific experts.[25] Rather, they simply copied the protocols developed by their colleagues from other states. For example:

- A Circuit Court Judge in Kentucky noted:

  > In developing a lethal injection protocol, the Commonwealth of Kentucky, Department of Corrections, did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned. Kentucky appears to be no different from any other state or the Government of the United States.[26]

- When asked how the lethal injection protocol committee put together Tennessee's procedures, a committee member responded: "There wasn't a lot of discussion on it once the team had access to the information that was provided from other states. Indianapolis, Indiana, Florida, Texas, they all used the same chemicals."[27] The Tennessee Supreme Court found that Tennessee's protocol

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[22] Deborah Denno, "When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us," *Ohio State Law Journal*, Vol. 63, 2002, p. 207-260 (includes redacted versions of state lethal injection protocols).

[23] Tennessee Code Annotated 40-23-114(c).

[24] *Sims v. State,* 754 So. 2d 657, 670 (Florida 2000).

[25] Human Rights Watch telephone interview with Deborah Denno, professor of law at Fordham University Law School, New York, New York, March 16, 2006. Denno has conducted the only existing comprehensive study of lethal injection state protocols. In addition to her academic work, she serves as an expert witness on behalf of prisoners challenging state lethal injection procedures.

[26] *Baze, et al. v. Rees, et al.*, Case No. 04-CI-1094, July 8, 2005, p. 6.

[27] Testimony of Warden Richard Peabody, Special Hearing, *Abdr'Rahman v Sundquist* et al., Case No. 02-2236-III,Vol. II, September 16, 2003, p. 63.

"was developed simply by copying the state method currently in use by some thirty other states."[28]

- According to a memorandum from the Washington State Department of Corrections: "All of our policies and procedures have been designed utilizing the State of Texas as a model ... [T]he states of Texas and Missouri have conducted numerous executions and remain the best and tested source of information."[29]

- A Wyoming warden noted "that Wyoming's injection procedure is cloned from the Texas injection procedure. Visited Warden Jack Pursley at Huntsville, Texas and participated in an execution seminar [*sic*]. So I am confident that Wyoming's policy based upon proven Texas procedures will be reliable."[30]

- According to a former warden of the Colorado State Penitentiary, Colorado corrections officials went to Texas and Oklahoma to examine how they conducted lethal injection executions and then copied them, because their lethal injection protocols "seemed time-honored, tested, well-designed, and effective."[31]

- The Secretary of Pennsylvania's Department of Corrections noted that they "adopted almost to a T" the Texas lethal injection protocol.[32]

### *Oklahoma*

In 1977, Oklahoma enacted the first lethal injection statute. Its history illustrates the minimal inquiry legislators conducted before selecting a specific method of lethal injection. Facing the expensive prospect of fixing the state's broken electric chair, the Oklahoma legislature was looking for a cheaper and more humane way to execute its

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[28] *Abdur'Rahman v. Bredesen, et al.*, Tennessee Supreme Court, October 17, 2005, No. M2003-01767-COA-R3-CV, p. 77a.

[29] Unsigned memorandum from the State of Washington, Department of Corrections, to Louisiana State Penitentiary Warden Richard L. Peabody, dated October 10, 1990, read into evidence by Warden Peabody, *Louisiana v. Code*, p. 108.

[30] Letter from Wyoming Warden Duane Shillinger to Louisiana Warden Richard Peabody, dated October 2, 1990, read into evidence by Warden Peabody, *Louisiana v. Code*, p. 108-109.

[31] Human Rights Watch telephone interview with Gene Atherton, former warden of the Colorado State Penitentiary (where death row is located in Colorado), March 30, 2006.

[32] Human Rights Watch telephone interview with Jeffrey A. Beard, secretary, Pennsylvania Department of Corrections, March 28, 2006.

condemned inmates.[33] State Assembly member Bill Wiseman wanted to introduce a bill in the Oklahoma House of Representatives allowing for lethal injection executions in Oklahoma.[34] In 1976, he approached the Oklahoma Medical Association for help developing a drug protocol, but it refused to get involved based on ethical concerns about the cooperation of medical professionals in the development of execution methods.[35] Wiseman approached Dr. Jay Chapman, the state's medical examiner, and asked for his help in drafting a lethal injection statute.[36] Despite having "no experience with this sort of thing," Chapman agreed to help Wiseman.[37] Sitting in Wiseman's office in the Capitol, Chapman dictated the following lines, which Wiseman jotted down on a yellow legal pad: "An intravenous saline drip shall be started in the prisoner's arm, into which shall be introduced a lethal injection consisting of an ultra-short-acting barbiturate in combination with a chemical paralytic."[38] Meanwhile, State Senator Bill Dawson, concerned about the cost of replacing Oklahoma's broken electric chair, was also interested in introducing a lethal injection bill in the Oklahoma Senate. Senator Dawson consulted with his friend, Dr. Stanley Deutsch, then head of the Oklahoma Medical School's Anesthesiology Department.[39] After reviewing the language Chapman had composed for Assembly member Wiseman, Deutsch noted, in a letter to Senator Dawson, that anesthetizing condemned inmates would be a "rapidly pleasant way of producing unconsciousness" leading to death.[40]

Oklahoma's state statute copies nearly word-for-word the methods proposed by Chapman and approved in Deutsch's brief letter, stating that "the punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate" in "combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice."[41] There is no evidence that Oklahoma state legislators consulted any other

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[33] Denno, "When Legislatures Delegate Death," p. 96.

[34] Beiser, "A Guilty Man."

[35] Ibid.

[36] Interview with Chapman.

[37] Ibid.

[38] Ibid.

[39] Denno, "When Legislatures Delegate Death," p. 95.

[40] Letter from Stanley Deutsch, Ph.D., M.D., professor of anesthesiology, University of Oklahoma Health Sciences Center, to the Honorable Bill Dawson, Oklahoma state senator, February 28, 1977 (copy on file with Human Rights Watch) (Deutsch Letter).

[41] Oklahoma Statue Annotated Title 22, Section 1014(A). Also, see Deutsch Letter (Deutsch writes that unconsciousness and then death would be produced by "the administration ... intravenously ... in [specified] quantities of ...an ultra short acting barbiturate" in "combination" with a "nueormuscular [*sic*] blocking agent" to create a "long duration of paralysis"). See also Oklahoma Engrossed Senate Bill No. 10, March 2, 1977 (copy on file with Human Rights Watch). Some senators disagreed with the state's adoption of lethal injection executions. One senator's proposed amendment, which failed, called for "inserting the following after the word 'by' on line four, adopting the Biblical procedure of 'Eye for Eye', i.e.,

medical experts before adopting their lethal injection statute.[42] Human Rights Watch asked Chapman why he chose the two drugs (an ultra-short-acting barbiturate and a paralytic agent) for lethal injection executions. He stated: "I didn't do any research. I just knew from having been placed under anesthesia myself, what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure if one didn't kill him, the other would."[43] The Oklahoma state legislature has not significantly amended the statute regarding the drugs to be used during lethal injections since its original enactment.[44]

In addition to his work on the statute, Chapman developed the original three-drug protocol used by the Oklahoma Department of Corrections.[45] Although Oklahoma's statute specifies two drugs, Chapman included a third drug, potassium chloride.[46] When Human Rights Watch asked Chapman why he added a third drug to the two drugs specified in the statute, he replied, "Why not?" He went on to explain that, even though the other chemicals, in the dosages called for, would kill the prisoner, "You just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug?" He is not sure why he picked potassium chloride. "I didn't do any research ... it's just common knowledge. Doctors know potassium chloride is lethal. Why does it matter why I chose it?"[47]

### *Texas*

Almost immediately after Oklahoma passed its lethal injection statute, the Texas legislature passed a law authorizing executions by lethal injection.[48] Within ten years of the law's enactment, Texas had executed fifty-three prisoners by lethal injection.[49] The law delegates responsibility for developing protocols regarding the lethal substances to be used to the state corrections agency.[50] Because Texas was the first state to actually execute anyone by lethal injection, and immediately established itself as the state with the

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each person convicted shall be executed in the same manner as the death of the victim for which the conviction occurred, and striking all remaining language through line eight on p. 2." Amendment Motion, April 20, 1977 (copy on file with Human Rights Watch).

[42] Denno, "When Legislatures Delegate Death," p. 96.

[43] Interview with Chapman.

[44] Oklahoma Statue Annotated, Title 22, Section 1014(A).

[45] Interview with Chapman.

[46] Ibid.

[47] Ibid.

[48] Denno; "When Legislatures Delegate Death," p. 96.

[49] DPIC, "Execution Database."

[50] Texas Criminal Procedure Code Annotated Article 43.14.

most lethal injection executions,[51] its protocols have had enormous influence on other states. Many state corrections officials consulted with Texas officials when developing their own protocols.[52]

Like its Oklahoma predecessor, the Texas protocol involves the use of three drugs.[53] But the state has refused to provide additional information on its procedures for lethal injections, citing security concerns.[54] The observations of Louisiana corrections officials who visited Texas shed light on the ad hoc and unscientific manner in which Texas has conducted its lethal injection executions.

In 1990, the Louisiana Department of Corrections formed a committee to create a lethal injection protocol. As a member of the committee, the Department's chief legal counsel consulted with the warden responsible for executions in the Texas Department of Corrections. She found the experience "surprising."[55] The warden refused to speak with the attorney over the phone about his protocols, explaining "he didn't say these things on the phone that he would rather say in person."[56]

When the attorney arrived in Texas with other members of the committee, the warden "asked us if any of us had tape recorders, if any of us were wired."[57] The warden then proceeded to speak about Texas's lethal injection protocols. According to the attorney, "He didn't really have so much of a policy about it, as he did just sort of—they did whatever worked at the time. He pretty much told us he didn't have a strict policy."[58]

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[51] Texas has executed 362 condemned inmates by lethal injection. DPIC, "Execution Database."

[52] E.g., Colorado, Florida, Indiana, Kentucky, Missouri, Tennessee, Washington, and Wyoming (as described at the beginning of the section of this report on "Development of Lethal Injection Protocols").

[53] Texas Department of Criminal Justice, "Death Row Facts," http://www.tdcj.state.tx.us/stat/drowfacts.htm (retrieved March 21, 2006).

[54] Letter to Alberta Phillips, Editorial Department of the *Austin-American Statesman*, from James L. Hall, assistant general counsel, Office of the General Counsel, Texas Department of Criminal Justice, dated January 2, 2004. Hall explains:

> Information about execution procedures is held in the strictest of confidence, is generally not reduced to writing, and is known only to a few people within the Department. That confidentiality is maintained to ensure that security procedures established for executions are not compromised. Thus, to the extent we have written policies and procedures responsive to your request, that information has been found to be confidential and not available to the public.

(copy of letter on file with Human Rights Watch).

[55] See Testimony of Annette Viator, Special Hearing, *Cain v. Code*, Case No. 138,860-A, March 18, 2003, Vol. II, p. 32.

[56] Ibid.

[57] Ibid.

[58] Ibid., p. 33.

When the attorney inquired about the "medical portion" of Texas's lethal injection protocol, the warden told her:

> [T]hat the only thing that mattered was that the guy ended up dead and that he wasn't worried too much about the amount of medicine. He had certainly used the same types of medicine, but that he wasn't totally concerned about the amounts or what it may or may not do. They ended up dead, and that's all he was worried about. The rest of our conversation with him tracked that same thing. He was not terribly concerned about policy, procedure, or who did what, when, where. Just so the right result happened.[59]

The Louisiana State Penitentiary pharmacy director has recounted a conversation he had in 1990 with the Texas Department of Corrections pharmacy director about the drugs Texas used in its lethal injections:

> We were getting ready to hang up the phone, and I said, 'I have but just one question I need to ask you. Every other state I have spoken to is using 2 grams of sodium pentothal. Why are y'all using five?' And he started laughing and said, 'Well, you see, when we did our very first execution, the only thing I had on hand was a 5-gram vial. And rather than do the paperwork on wasting 3 grams, we just gave all five.'[60]

Another member of the Louisiana committee observed a Texas lethal injection and noted that the administration of the drugs was on a "time frame that was fairly tight."[61] It seemed to him the execution team simply administered the drugs one after the other, without pausing to ascertain whether the drugs were having their intended effect.[62]

### *Tennessee*

In 1998, in response to the passage of a lethal injection statute, the Commissioner of Tennessee's Department of Corrections set up an "ad hoc" committee to develop an

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[59] Ibid.

[60] Testimony of Donald Courts, Special Hearing, *Louisiana v. Code,* Case No. 138,860, March 18, 2003, Vol. II, p. 58-59.

[61] Testimony of Deputy Warden Richard Peabody, Special Hearing, *Louisiana v. Code,* Case No. 138,860A, September 16, 2003, p. 48.

[62] Regardless of any misgivings they had, the Louisiana execution protocol team chose a lethal injection protocol for Louisiana that "paralleled the procedure in Texas fairly closely." Ibid., p. 46.

execution protocol. The committee was composed solely of department personnel, none of whom had any medical or scientific background.[63] The group met four times over five months; none of the meetings were public nor did the group seek public input.[64] The committee did not consult with physicians or pharmacologists, or with any other person who had medical or scientific training.[65] The committee gave Warden Ricky Bell, who had no college degree, the task of putting together the execution protocol.[66] An internal memorandum, written by a committee member, warned the committee about other states' problems with executions by lethal injection.[67] Nonetheless, Bell modeled Tennessee's present lethal injection execution protocols entirely on information he received from two other states' corrections departments—Indiana and Texas.[68]

### *Lethal Injection Machines*

The lack of care with which states developed their lethal injection protocols is well exemplified by their willingness to buy lethal injection machines from Fred Leuchter. From 1979 to 1990, Leuchter, a layperson with no engineering, medical or pharmacological training, was the only supplier of execution equipment in the United States. He built, installed, and repaired many different types of machinery for executions, including gas chambers, electrocution chairs, and the now-defunct lethal injection machine.[69] He tested his theories about what types and dosages of chemicals to use in the lethal injection machine by experimenting on pigs.[70] In his promotional material, Leuchter promised that his lethal injection machine would "insure a problem-free

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[63] See Memorandum from Jim Rose, assistant commissioner of operations, to Donal Campbell, commissioner for the Tennessee Department of Corrections, June 22, 1998 (copy on file with Human Rights Watch). For a description of the committee members qualifications (or lack thereof), see Deposition of Debra K. Inglis, general counsel for the Tennessee Department of Corrections, *Rahman v. Sundquist, et al.*, Case No. 02-2236-III, March 25, 2003, p. 15-16, 38 (copy on file with Human Rights Watch) (Deposition of Inglis).

[64] Memorandums from the four meetings are on file with Human Rights Watch. See also Testimony of Ricky Bell, Transcript of Proceedings, *Abu-Ali Abdur'Rahman v. Sundquist*, Case No. 02-2236-III, May 29, 2003, p.204 (copy on file with Human Rights Watch) (Testimony of Bell).

[65] Inglis Deposition, p. 15-16; Testimony of Bell, p. 200-209.

[66] Testimony of Bell, p. 200.

[67] Memorandum from Virginia Lewis to the Committee Members (copy on file with Human Rights Watch). Quoting from a 1997 National Legal Aid and Defender Association study, the memo states: "Lethal injections are also the most frequently botched means of execution—defined to include unanticipated problems or delays that caused, or could have caused, unnecessary agony for the prisoner and/or witnesses." Lewis continues in her own words, "Unfortunately the critics consider length of time and difficulty in finding suitable veins to be 'botched' cases and the criticism is worse when veins collapse and the IV has to be restarted." Ibid. (It is not clear from the committee's notes or committee member trial testimony what Lewis's title was within the Department of Corrections.)

[68] Petitioner's Brief, *Abdur'Rahman v. Bredesen, et al.*, February 15, 2006, p. 4.

[69] Beiser, "A Guilty Man." See also James Bandler, "Fred Leuchter: Killing Time with Death's Efficiency Expert," *In These Times*, June 20-July 3, 1990, p. 22.

[70] Stephen Trombley, *The Execution Protocol: Inside America's Capital Punishment Industry* (New York: Crown Publishers, 1992), p. 76-78.

execution."[71] Seventeen states purchased the machine.[72] When he had an order to fill, Leuchter manufactured the machine in the basement of his house.[73]

The lethal injection machine had two parts—a "control module" and a "delivery module"—which allowed the executioners to start the lethal injection from a room separate from the inmate. The control module essentially consisted of two on/off switches, only one of which actually triggered the chemicals to flow from the delivery module. In this way, the two people assigned to push the two buttons would not know which one of them actually started the administration of the lethal injection drugs. The delivery module contained two syringes filled with saline, two syringes filled with sodium thiopental, two syringes filled with pancuronium bromide, and two syringes filled with potassium chloride. Once the machine was activated, it delivered the drugs, with saline flushes in between, for ten seconds each, one minute apart from one another, to an intravenous line running from the delivery module to the prisoner's vein. With the use of this machine, an execution should take "four minutes."[74]

Leuchter's execution equipment business stopped abruptly in 1990. It did not stop because correction agencies realized that Leuchter was totally unqualified to construct such equipment, but because he testified as an expert witness on behalf of a Holocaust denier.[75] In the course of discrediting Leuchter as an expert witness, the prosecutor established that Leuchter in fact had no engineering credentials, and held only a Bachelor of Arts degree in history.[76]

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[71] Fred A. Leuchter Associates, Inc., "Execution by Lethal Injection Missouri: Lethal Injection Machine Manual State of Missouri," October 15, 1988 (copy on file with Human Rights Watch).

[72] According to Leuchter, during his time in business, he consulted with or provided equipment to twenty-seven states. Seventeen states and the United States Army purchased lethal injection machines from Leuchter. Those states included: Arizona, California, Colorado, Delaware, Illinois, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Texas, Utah, Washington, and Wyoming. Denno, "Is Electrocution an Unconstitutional Method of Execution?" p. 627, footnote 496.

[73] Trombley, *The Execution Protocol*, p. vii.

[74] Ibid, p. 78.

[75] Leuchter himself denied that the Nazis could have killed six million Jews in gas chambers. His anti-Holocaust conclusions were printed in a book, *The Leuchter Report*. Fred Leuchter, *The Leuchter Report: The End of Myth: An Engineering Report on the Alleged Execution Gas Chambers of Auschwitz, Birkenau and Madjanek*, (Poland: Samisdat Publishers, Ltd., 1988), http://www.ihr.org/books/leuchter/leuchter.toc.html (retrieved April 1, 2006).

[76] Bandler, "Fred Leuchter," p. 22-23. Despite the fact that Leuchter admitted misrepresenting himself as an engineer to various states when he provided equipment or advice for their death penalty practice, Leuchter never faced criminal charges. Consent Agreement, *Commonwealth v. Leuchter*, No. EN 90-102, Massachusetts District Court, signed June 11, 1991, p. 1.

It is not clear how many states actually used Leuchter's lethal injection machine or how many prisoners were unwitting guinea pigs for his deadly invention. What is remarkable, however, is that states ever bought Leuchter's lethal injection machines in the first place. One can only speculate as to how much—if any—research the states did into Leuchter and his lethal injection machine before they signed purchase agreements.

### *Public Access to Lethal Injection Protocols*

Human Rights Watch is aware of only one state, New Jersey, which has ever opened its lethal injection protocol to public input and comment.[77] While thirty-six lethal injection states make public the names of the drugs used during their lethal injection executions and the basic method of administration, corrections officials claim that reasons of security prevent them from making the entire protocol available to the public. Human Rights Watch does not know if the parts of the protocols that remain secret provide fuller details of what the execution team is supposed to do before, during, and after the execution.

Some states do not even have written protocols. Louisiana did not have a written protocol until 2002, nine years after the legislature authorized lethal injection executions. During that period, seven prisoners were executed by lethal injection, with the protocol passed down by "word of mouth" between members of various execution teams.[78] The Florida Department of Corrections has not promulgated an administrative regulation nor published any guidance prescribing the lethal injection procedures it uses to execute condemned prisoners. The Florida Supreme Court agreed with the corrections department that a published protocol is not needed because the department has the authority to change its rules any time for any reason.[79]

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[77] In 2001, the New Jersey Department of Corrections (NJDOC) proposed to re-adopt and amend the regulations setting forth New Jersey's lethal injection protocol. The amendment also included the removal of the emergency crash cart from the execution chamber. New Jerseyans Against the Death Penalty (NJDAP) brought an action challenging the regulations. The court held that the proposed changes in the regulations lacked an adequate administrative record demonstrating that they were based upon "reasoned medical opinion." In Re Readoption, 367 New Jersey Superior, p. 69. Without such a record, the court found, NJDOC was unable to demonstrate that the regulations at issue comport with contemporary standards of decency and morality. Ibid. NJDOC subsequently held a public hearing on February 4, 2005 but has yet to promulgate final regulations. The process was halted when then Governor Richard Codey signed into law a death penalty moratorium for New Jersey at the beginning of 2006. See "New Jersey's execution protocol up for comment," http://www.democracyinaction.org/dia/organizations/ncadp/news.jsp?key=1223&t (retrieved March 22, 2006).

[78] Testimony of Dora Rabalais, director of legal programs at Louisiana State Penitentiary, Angola, Special Hearing, *Code v. Cain*, Vol. 1, No. 138,860-A, February 10, 2003, p. 25. "Word of mouth" from Testimony of David Meredith, former member of Louisiana State Penitentiary Execution Team, Special Hearing, *Code v. Cain,* Vol. 1, No. 138,860-A, February 10, 2003, p. 19.

[79] *Sims v. State,* 754 So. 2d 657, 670 (Florida 2000).

## II. Lethal Injection Drugs

*I don't know the medical rationale, no. . . . Regarding the specific amounts of individual drugs, I have no knowledge as to what drug quantities were used, or why they may have differed from other states, no, I do not . . . that was beyond me.*

—Richard Peabody, Louisiana State Penitentiary deputy warden, responding to a question about the drugs used in Louisiana's lethal injection protocol, which he helped to develop[80]

*It's not about the prisoner. It's about public policy. It's about the audience and prison personnel who have to carry out the execution.*

—Dr. Mark Dershwitz, anesthesiologist and expert witness for state corrections departments on lethal injection drug protocols[81]

Thirty-six states use the same three-drug sequence for lethal injections: sodium thiopental to render the condemned inmate unconscious; pancuronium bromide to paralyze the condemned inmate's voluntary muscles; and potassium chloride to rapidly induce cardiac arrest and cause death.[82]

This three-drug sequence puts the prisoner at risk of high levels of pain and suffering. If he is not appropriately anesthetized, he will be awake when he is paralyzed by the pancuronium bromide and will experience suffocation when he is not able to breathe.[83] If the anesthesia remains insufficient, he will experience excruciating pain from the potassium chloride. Nevertheless, according to Human Rights Watch's research, no state which has used these three drugs for lethal injections has ever changed to different drugs.[84]

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[80] *Louisiana v. Code*, p. 74, 86.

[81] Human Rights Watch telephone interview with Dr. Mark Dershwitz, professor of anesthesiology at the University of Massachusetts, Boston, Massachusetts, March 1, 2006.

[82] Of the states using lethal injections for executions, Nevada is the only state which will not publicly reveal its drug protocol. Human Rights Watch telephone interview with Fritz Schlommater, Nevada Department of Corrections, March 31, 2006.

[83] Testimony of Dr. Mark Dershwitz, *Reid v. Johnson*, No. Civ. A. 3:03CV1039, August 30, 2004, p. 26 ("And I freely admit that a person who's rendered paralyzed with a drug like pancuronium who also happens to be awake, that would be considered horrible. And those of us who routinely use pancuronium in our practice, take great pains to make sure that none of our patients are awake and paralyzed at the same time.") (Dershwitz Testimony).

[84] For example, in 1999, New Jersey was facing its first lethal injection execution. The NJDOC was aware of potential problems with the drugs called for in the state statute. In 1983, when New Jersey's lethal injection statute was passed, a doctor at the NJDOC warned the NJDOC assistant commissioner that he had "concerns in regard to the chemical substance classes from which the lethal substances may be selected." The

### *Potassium Chloride*

Potassium chloride is the drug that causes death in an execution under current lethal injection protocols. Although the other two drugs are administered in lethal dosages and would, in time, produce the prisoner's death, potassium chloride should cause cardiac arrest and death within a minute of injection.[85] While potassium chloride acts quickly, it is excruciatingly painful if administered without proper anesthesia.[86] When injected into a vein, it inflames the potassium ions in the sensory nerve fibers, literally burning up the veins as it travels to the heart.[87] Potassium chloride is so painful that the American Veterinary Medical Association (AVMA) prohibits its use as the sole agent of euthanasia—it may only be used after the animal has been properly anesthetized.[88]

There are less painful drugs that will cause death. For example, experts have suggested pentobarbital, which can be administered in a single injection. Indeed, this is the most common method of euthanizing domesticated animals.[89] In Oregon, which has legalized physician-assisted suicide for the terminally ill, state doctors prescribe an overdose of barbiturates like pentobarbital for their dying patients. The state's medical ethics board determined that an overdose from a long-acting barbiturate was the most humane way to help someone die—it is painless, effective, and does not require the presence of a doctor

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commissioner at the time, Jack Terhune, sought an amendment to New Jersey's lethal injection statute to allow the commissioner to choose better drugs if they came along. "[We wanted] a generic statement, like 'drugs to be determined and identified by the commissioner, or the attorney general, or the Department of Health'. Who knew what the future was going to bring?" The proposed amendment did not pass, and the statue remains the same as it was when passed in 1983. "New Jersey's Waltz with Death," *New Jersey Law Journal*, November 25, 2002, http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/feb03/0677.html (retrieved April 4, 2006).

[85] Dershwitz Testimony, p. 19.

[86] See Carol Benfell, "Routine but deadly drug: Potassium Chloride has Jekyll and Hyde personality," *Santa Rosa Press Democrat*, March 23, 1997, http://www.iatrogenic.org/potchlor.html (retrieved March 13, 2006); "America's Riskiest Drugs: Potassium Chloride," February, 24, 2003, http://www.forbes.com/2003/02/24/cx_mh_0224potassium.html (retrieved March 13, 2006). Diana Wiley, "Mistakes that Kill," *Maclean's*, August 31, 2001 (including a case where a woman witnessed her son's death when he accidentally received a dose of potassium chloride. She recounts his reactions to the drug: "Please stop," he cried out. "You're hurting me, it's burning, it's making me dizzy.").

[87] Dershwitz Testimony, p. 39-40 ("If potassium chloride is given to an awake individual, in other words, before thiopental, before the heart stops, it would be quite painful because it's very irritating for blood vessels.").

[88] *2000 Report of the AVMA Panel on Euthanasia*, 218 J. A.V.M.A., 680-681 (2001), http://www.avma.org/issues/animal_welfare/euthanasia.pdf (retrieved April 2, 2006) (*2000 Report of the AVMA Panel on Euthanasia*) ("Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli."). See also Affidavit of Dr. Kevin Concannan, D.V.M., D.A.C.V.A., *Page, et al. v. Beck, et al.*, Case No. 5:04-CT-04-BO, August 31, 2005, p. 4 ("Potassium chloride is unacceptable in euthanasia protocols that fail to provide for the presence of properly trained veterinary personnel to induce proper anesthesia, assess the physical signs indicating the veterinary patient's state of consciousness, and maintain an unconscious state throughout the euthanasia process.").

[89] Dr. T.J. Dunn, Jr., "Euthanasia: What to Expect," http://www.thepetcenter.com/imtop/euthanasia.htm (retrieved April 14, 2006).

at the time of ingestion in pill form.[90] According to a physician who consulted with Oregon legislators before the passage of the physician-assisted suicide bill in 1994, an overdose from a drug like pentobarbital is "the best death one could give someone who is suffering."[91]

Medical experts have also recommended one lethal dosage of sodium thiopental without following it with other drugs. A single injection of this drug "has all the advantages and none of the disadvantages that other drugs manifest [which are] difficult, cumbersome, [and] amateurish to utilize."[92]

Dr. Mark Dershwitz is a professor of anesthesiology who has been an expert witness on behalf of several states, defending their lethal injection protocols against constitutional challenges.[93] Dershwitz told Human Rights Watch that state officials have asked him about drugs other than potassium chloride that they could use to induce cardiac arrest in a condemned inmate. He said they have asked specifically about "the vet option," meaning the use of pentobarbital. Dershwitz recounted for Human Rights Watch how he explained to the officials the difference between the pharmacological effects of pentobarbital and potassium chloride:

> The pharmacological effect of potassium chloride kills an inmate, and it happens quickly. If one uses just a large does of barbiturate, circulation will stop, the inmate will die, but it won't happen in two minutes. Electrical activity in the heart may persist for a very long time, in healthy people almost certainly for more than a half an hour. Everyone involved will have to wait a very long time for the heart to stop.[94]

According to Dershwitz, no state corrections official whom he has told about the increased length of time pentobarbital may take to kill a condemned inmate has pursued

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[90] See Oregon Department of Human Services, "Physician Assisted Suicide," http://www.oregon.gov/DHS/ph/pas/ors.shtml (retrieved March 1, 2006). Also, Human Rights Watch telephone interview with a physician who consulted with the state legislator and served on the state medical ethics board (and asked to remain anonymous due to the sensitivity of the issue in Oregon), Portland, Oregon, March 6, 2006.

[91] Interview with an Oregon physician.

[92] From an advisory paper submitted to the NJDOC from a group of New York nurses in 1983, cited in "New Jersey's Waltz with Death." The NJDOC did not follow the nurses' advice. "New Jersey's Waltz with Death." The DOC received a document from a New York nurses in 1983.

[93] The states for which Dershwitz has testified include Kentucky, Maryland, Missouri, and Virginia. E-mail correspondence to Human Rights Watch from Dershwitz, March 22, 2006.

[94] Interview with Dershwitz.

using it instead of potassium chloride, even though pentobarbital is less painful. Human Rights Watch asked Dershwitz to explain why he thought corrections officials would risk using a painful drug like potassium chloride rather than a safer drug like pentobarbital; he said:

> It's not about the prisoner. It's about public policy. It's about the audience and prison personnel who have to carry out the execution. It would be hard for everybody to have to sit and wait for the EKG activity to cease so they can declare the prisoner dead.[95]

### *Pancuronium Bromide*

Pancuronium bromide, commonly known by its brand name Pavulon, is a neuromuscular blocking agent that paralyzes all of a body's voluntary muscles, including the lungs and diaphragm.[96] Given enough time to act, Pavulon will cause death by asphyxiation. It does not affect consciousness, however. Nor does it affect experience of pain. Without proper anesthesia, anyone given Pavulon will feel himself suffocating, but, because the pancuronium bromide prevents any movement, speech, or facial expression, he will be unable to reveal that he is suffering.[97] If the prisoner is still conscious when the potassium chloride is injected, the Pavulon will also prevent him from conveying to the executioners or the witnesses that he is experiencing pain.[98]

When a patient is awake during surgery and able to recall the experience afterward, the condition is called "intraoperative awareness."[99] The problem is so serious that in 2005 the American Society of Anesthesiologists issued a "Practice Advisory." The advisory notes that certain conditions may increase the risk of someone experiencing

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[95] Ibid.

[96] Randall C. Baselt, Ph.D., *Disposition of Toxic Drugs and Chemicals in Man*, Seventh Ed., (Foster City, CA: Biomedical Publications, 2004).

[97] Ibid.

[98] Dershwitz Testimony, p. 75 ("Counsel: Would the injection of Pavulon impede the Warden's ability to be able to say whether he sees any reaction or not on the inmate's part to the drugs? Dr. Dershwitz: Well yes. For instance, if the pancuronium was the first drug given and the person were conscious when experiencing paralysis, they would have no motor or mechanical way of communicating their displeasure.").

[99] According to the Joint Commission International Center for Patient Safety, "Anesthesia awareness, also called unintended intraoperative awareness, occurs under general anesthesia when a patient becomes cognizant of some or all events during surgery or a procedure and has direct recall of those events. Because of the routine use of neuromuscular blocking agents (also called paralytics) during general anesthesia, the patient is often unable to communicate with the surgical team if this occurs." American Society of Anesthesiologists, "Practice Advisory for Intraoperative Awareness and Brain Monitoring: A Report by the American Society of Anesthesiologist Task Force on Intraoperative Awareness," Case 5:06-cv-00219-JF, February 14, 2005 (copy on file with Human Rights Watch), p. 3 (ASA Advisory).

intraoperative awareness, including when the anesthesia is administered intravenously (as it is in lethal injection executions) or when the person receiving anesthesia has a history of substance abuse—often frequent with prisoners.[100] Surgery patients who have been administered Pavulon or other neuromuscular blocking agents with inadequate anesthesia have reported terrifying and torturous experiences where they were alert, experiencing pain, and yet utterly unable to signal their suffering.[101] A woman who was awake but paralyzed by a neuromuscular agent during her eye surgery explained her efforts to make the surgeon aware she was conscious: "I was fighting to move with every ounce of energy I had . . . and there was no acknowledgment from the anesthesiologist."[102] Once she realized that she could not convey to the doctors that she was awake, she felt: "I would rather die than stay like this . . . I just don't want to be alive. I can't—I can't stay alive through this. I—I just can't do it."[103]

The danger of masked suffering because of neuromuscular blocking agents like pancuronium bromide is so great that at least thirty states have banned by statute the use of such drugs in the euthanasia of animals.[104] It is noteworthy that the AVMA has said that, "[a] combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent" for animals, because of the concern about controlling the proper onset and timing of anesthetic agents and paralytic agents.[105] In other words, state corrections officials have settled on a protocol and procedure to kill their

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[100] ASA Advisory, p. 8.

[101] For instance, Jeanette Liska, author of *Silenced Screams,* describes her 1990 experience of lying paralyzed and awake on the operating table with no way of communicating her awareness to the doctors and nurses in the room: "Drowning in an ocean of searing agony, I sensed the skein of my entire life unraveling, thread by thread. But I was the only one who heard my tortured screams—silent screams that reverberated again and again off the cold walls of my skull." Jeanette Liska, *Silenced Screams; Surviving Anesthetic Awareness During Surgery: a True-Life Account* (Council for Public Interest in Anesthesia and American Association of Nurse Anesthetists, September 2002).

[102] Testimony of Carol Weihrer, Special Hearing, *Code v. Cain*, Case No. 138,860-A, February 13, 2003, p. 16-17 (Weiherer Testimony). Weihrer is the founder and president of Anesthesia Awareness, http://www.anesthesiaawareness.com/ (retrieved March 25, 2006).

[103] Weihrer Testimony, p. 18.

[104] See Alabama Code 34-29-131; Alaska Statute 08.02.050; Arizona Revised Statute Annotated 11-1021; California Business and Professional Code 4827; Colorado Review Statute 18-9-201; Connecticut General Statute 22-344a; Delaware Code Annotated Title 3, Section 8001; See Florida Statute 828.065; Georgia Code Annotated 4-11-5.1; 510 Illinois Comp. Statute 70/2.09; Kansas Statute Annotated 47-1718(a); Louisiana Revised Statutes Annotated 3:2465; Massachusetts General Laws Chapter 140 Section 151A; Michigan Comp. Laws 333.7333; Missouri Revised Statute 578.005(7); Nebraska Revised Statutes 54-2503; Nevada Revised Statutes Annotated 638.005; New Jersey Statute Annotated 4:22-19.3; New York. Agriculture and Markets Law 374; Ohio Revised Code Annotated 4729.532; Oklahoma Statute Title 4 Section 501; Oregon Revised Statute 686.040(6); Rhode Island General Laws 4-1-34; South Carolina Code Annotated 47-3-420; Tennessee Code Annotated 44-17-303; Texas Health and Safety Code Annotated 821.052(a); West Virginia Code 30-10A-8; Wyoming Statute Annotated 33-30-216.

[105] *2000 Report of the AVMA Panel on Euthanasia.*

condemned inmates that is considered too risky and dangerous for the euthanasia of dogs and cats.

At least some wardens are aware of the danger that an inmate may be conscious during his execution but unable to convey his pain. For example, the North Carolina warden who oversees that state's executions has stated: "I know there were some concerns raised that the way we were using the drugs at that time could possibly cause an inmate to become conscious during an execution."[106]

In the three-drug sequence, the neuromuscular blocking agent such as Pavulon is not necessary to ensure the prisoner's death nor does it reduce any suffering he may feel. Confronting a record devoid of justification for the use of Pavulon, the Tennessee Supreme Court concluded its use is "unnecessary and the state has no reason for using such a 'psychologically horrific' drug to execute [a condemned inmate]... If Pavulon were eliminated from the ... lethal injection method, it would not decrease the efficacy or the humaneness of the procedure."[107] Asked why he included a paralytic agent in Oklahoma's statute, Chapman told Human Rights Watch: "What's the problem? We could have a five or six drug protocol, I don't care. I called for the use of a barbiturate and a paralytic agent just because it's better to have two things that could kill a prisoner than one."[108]

Pancuronium bromide does serve a purpose, however. It places a "chemical veil" between the condemned prisoner and the execution team and witnesses.[109] According to

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[106] Deposition of Deputy Warden Marvin Polk, *Page, et al. v. Beck, et al.*, September 8, 2005, p. 15 (Polk Deposition).

[107] *Abdur'Rahmnan v. Bredesen, at al.*, SC of TN, No. M2003-01767-SC-R11-CV, October 17, 2005, p. 89a. The Court also found that: "The method could be updated with second or third generation drugs to, for example, streamline the number of injections administered. Moreover, the state's use of Pavulon, a drug outlawed in Tennessee for euthanasia of pets, is arbitrary. The State failed to demonstrate any need whatsoever for the injection of Pavulon." Ibid., p. 77a. Nonetheless, the court found against the condemned inmate, citing a lack of any visible evidence that any Tennessee inmates had ever been conscious during their executions. This is exactly the kind of proof that the use of Pavulon would mask. Ibid., p. 89-92.

[108] Interview with Chapman.

[109] The phrase "chemical veil" may have first been used in the lethal injection context by Dr. Mark Heath in 2001, in a series of speeches he gave around the United States. Human Rights Watch telephone interview with Dr. Mark Heath, assistant professor of clinical anesthesiology at Columbia University, New York, New York, April 9, 2006. Heath is a leading researcher on how lethal injections are administered in the United States. Heath also serves as an expert witness on behalf of prisoners challenging state lethal injection protocols in court. See also, *Anderson et al v. Evans* et. al., (case number was not yet assigned), Petitioner's Complaint, July 13, 2005, p. 9. The American Civil Liberties Union (ACLU) of Northern California has filed a lawsuit on behalf of Pacific News Services seeking a permanent injunction to prevent the California Department of Corrections and San Quentin Prison from using the paralytic drug pancuronium bromide during executions, arguing that it violates the First Amendment rights of execution witnesses. Complaint for Declaratory and Injunctive Relief [42 United States Code Section 1983], (case number not yet assigned), March 8, 2006,

Dershwitz, "The pancuronium will prevent motor manifestations of physiological processes that could be perceived by witnesses as unpleasant or suffering on the part of the inmate."[110] When the potassium chloride induces cardiac arrest, it also deprives a condemned inmate's brain of oxygen, which may cause an "involuntary jerking of the arm and leg muscles ... a lay witness in the audience may misperceive that ... as something akin to suffering. And so the pancuronium would prevent the motor manifestation of that procedure ... so in my mind, the pancuronium does serve a useful purpose."[111]

In short, pancuronium bromide contributes to the appearance of a peaceful-looking execution. It reassures onlookers—and the public—that all is well, regardless of what the prisoner is actually experiencing.

### *Sodium Thiopental*

If condemned inmates are to be spared the intense suffering of conscious suffocation from pancuronium bromide, and the excruciating pain of potassium chloride burning through their veins, it is essential that they be properly anesthetized first. Sodium thiopental is the anesthetic administered at the start of the lethal injection execution to render the inmate unconscious before the other two drugs are injected.[112] State protocols generally call for between 1200 to 5000 milligrams of sodium thiopental,[113] amounts that far exceed dosages used in surgery.[114] If properly administered into the condemned inmate's bloodstream, the amount of the drug specified in most protocols would be more than sufficient to cause unconsciousness and, eventually, death.[115] The prisoner would stop breathing on his own within a minute or two of the chemical

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http://www.aclunc.org/privacy/060308-chemical_curtain.pdf (retrieved April 4, 2006). ACLU cooperating attorney John Streeter said: "The drug effectively creates a chemical curtain that hides what really goes on in the death chamber. In the name of freedom of the press, we are demanding that the State take that curtain down." ACLU of Northern California, Press Release, March 8, 2006, http://www.aclunc.org/pressrel/060308-lethal_injection.html (retrieved April 4, 2006).

[110] Dershwitz Testimony, p. 27.

[111] Ibid., p. 27-28.

[112] See, e.g., Affidavit of Oklahoma Warden Mike Mullin, July 5, 2005 (copy on file with Human Rights Watch) (describing Oklahoma's lethal injection procedures).

[113] Florida's execution protocol calls for "no less than 2000 mg per syringe [of each drug]." Florida Corrections Commission, "Execution Methods Used by States," http://www.fcc.state.fl.us/fcc/reports/methods/emcont.html (retrieved March 31, 2006); North Carolina's execution protocol calls for "no less than 3000 mg of sodium thiopental." North Carolina Department of Correction, "Execution Method," http://www.doc.state.nc.us/dop/deathpenalty/method.htm (retrieved at April 4, 2006).

[114] Interview with Heath, March 7, 2006.

[115] Ibid.

entering his veins.[116] However, as discussed in Chapter Three below, methods for the administration of anesthesia in lethal injection executions do not guarantee that the condemned inmate will be properly anesthetized.

### *The Failure to Review Protocols*

The three-drug sequence used today in lethal injections was developed almost three decades ago and then, over the following two decades, was adopted by all but one of the death penalty states.[117] Despite the passage of time, and medical advances, states have not changed this three-drug sequence. As the Tennessee Supreme Court acknowledged in 2005, while the "state of the art" of pharmacology has changed in the last thirty years, the chemical agents Tennessee uses to execute their prisoners have not.[118] Chapman chose the specific drugs to be used in Oklahoma's prototype lethal injection protocol based on what was widely used in medical surgeries at the time. He explained to Human Rights Watch that "at the time, I could not have seen that chemical agents used to induce anesthesia would change so markedly. . . . Today, I would have just not been so specific in my drug language in the protocols, so that corrections officials could use the best agents of their time."[119]

Over the years, states have tinkered with certain relatively insignificant aspects of their death penalty procedures, for example, addressing how an inmate is brought into the execution chamber,[120] whether to pay their executioners in cash or by check,[121] how to accommodate media access,[122] what type of catheter to use,[123] and what time of day the execution will take place.[124] But they have left intact the three-drug protocol and the basic process of administration (described in Chapter Three).

There are a few exceptions. In the mid-1990s, New Jersey corrections officials, in anticipation of the state's first lethal injection execution, reviewed its lethal injection

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[116] Ibid.

[117] E-mail correspondence to Human Rights Watch from Denno, March 29, 2006.

[118] Petitioner's Brief, *Abdur'Rahman v. Bredesen*, February 15, 2006, p. 77a.

[119] Interview with Chapman.

[120] Polk Deposition.

[121] "New Jersey's Waltz with Death."

[122] See "Minutes," *Robert Glen Coe Execution After Action Assessment*, April 27, 2000 (copy on file with Human Rights Watch).

[123] E-mail correspondence to Human Rights Watch from Reginald Wilkinson, secretary, Ohio Department of Corrections, April 2, 2006.

[124] Human Rights Watch telephone interview with Reverend Carroll Pickett, former death house chaplain in Texas, March 8, 2006 (Pickett notes that executions used to take place at midnight in Texas, but now take place around 6 p.m.).

protocols. "Because the state of the art is changing daily,"[125] corrections officials unsuccessfully sought an amendment to the state statute to delete reference to specific lethal agents.[126] In Pennsylvania, taking note of growing concerns about lethal injections, the Department of Corrections recently retained an outside consultant to review the state's lethal injection procedures. Jeffrey Beard, secretary of the Pennsylvania Department of Corrections, told Human Rights Watch that one of the options under consideration is the use of a brain monitor to assess the effect of the anesthesia before the other two drugs are administered.[127] Robert Myers, general counsel of the Arizona Department of Corrections, also told Human Rights Watch that the Department has recently decided to undertake a review of its lethal injection procedures.[128] Human Rights Watch is not aware of other states that have voluntarily, i.e. outside the context of litigation, taken steps to review their lethal injection protocols. Even when prisoners have challenged their states' lethal injection protocols, public officials have resisted considering whether there are better options. In prior and ongoing litigation, states have not offered to change their drug protocols or methods of administration.

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[125] Statement of Ronald Bollheimer, supervisor of legal and legislative affairs for New Jersey Department of Corrections, NJDOC public hearings transcript, February 4, 2005, p. 33 (copy on file with Human Rights Watch).

[126] "Memorandum" to Howard L. Beyer, assistant commissioner, Division of Operations, Department of Corrections, from Annie C. Paskow, assistant attorney general, chief, Appellate Bureau, July 28, 1998 (copy on file with Human Rights Watch). The legislature did not pass the amendment.

[127] Interview with Beard.

[128] Human Rights Watch telephone interview with Robert Myers, general counsel, Arizona Department of Corrections, March 29, 2006.

## III. Lethal Injection Procedures

*You guys doing that right?*

—Stanley "Tookie" Williams, at his December 14, 2005 execution, to a medical technician who, sweating and pale, spent eleven minutes probing Williams's arm before she successfully established an intravenous line[129]

The key to any claim that the standard three-drug lethal injection execution is not cruel is that the anesthesia renders the inmate unconscious and unable to feel pain before the other drugs are administered. Yet corrections officials do not ensure the anesthesia is effectively administered. During surgery, a trained anesthesiologist remains at the patient's side to determine whether the patient has reached the proper level of unconsciousness before the surgery proceeds, and to ensure the patient remains unconscious for the duration of the procedure.[130] For reasons that remain unclear, however, state corrections agencies have not incorporated into their lethal injection executions the same safeguards that accompany the administration of anesthesia in medical procedures. State lethal injection protocols do not require execution teams to include persons trained in administering anesthesia, do not permit personnel to be close enough to the condemned inmate to monitor the administration of the anesthesia, and do not use trained personnel to determine whether the condemned inmate is properly anesthetized before the other two drugs are injected.

The basic procedure states use in lethal injection executions is as follows:[131] The condemned prisoner is brought to the execution chamber and strapped to a gurney. Some states allow the witnesses to watch the executioner(s) insert the catheter into the prisoner's arm.[132] Other states draw a curtain over the windows behind which the witnesses sit so they do not see the execution team insert the catheter into the

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[129] Human Rights Watch telephone interview with Kevin Fagan, *San Francisco Chronicle* reporter and media witness to the execution of Stanley Tookie Williams, February 22, 2006. See also, Kevin Fagan, "The Execution of Stanley Tookie Williams Eyewitness: Prisoner Did Not Die Meekly, Quietly," *San Francisco Chronicle*, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/14/MNG05G7QMA1.DTL&hw=Stanley+Tookie+Williams&sn=003&sc=808 (retrieved April 4, 2006).

[130] See American Society of Anesthesiologists, "Standards for Basic Anesthetic Monitoring," amended October 25, 2005, http://www.asaq.org/publicationsAndServices/standards/02.pdf (retrieved March 22, 2006).

[131] See, .e.g., "San Quentin Operational Procedure No. 770, Lethal Injection Chamber," redacted, revised March 6, 2006, p. 33-35 (copy on file with Human Rights Watch). Individual state procedures may have minor variations.

[132] Interview with Fagan. See also Affidavit of Mike Mullin.

condemned inmate.[133] The catheter is hooked up to an intravenous line that extends for at least several feet into the room where the execution team administers the injections. That room or space may or may not have a one-way mirror so that the executioners can look out at the prisoner without being seen. If the curtains were closed, they are opened. Witnesses see the prisoner alone in the chamber, already hooked up to the intravenous (IV) lines. The execution team, which consists of one or more people, will have prepared syringes with the drugs and syringes with saline solution used to flush the lines in between each drug. Upon a signal from the warden, the team begins injecting the syringes into the IV lines, one after another, in the prescribed sequence, without a break.

Some states use a more complicated procedure. For example, in Oklahoma, catheters are inserted into both arms.[134] Three executioners plunge eleven syringes in a complicated sequence, alternating the drugs between the left and right arms. It is not known who, if anyone, directs the sequence of drug administration for the executioners. The process is then repeated by injecting a second round of drugs. By the end of the process, the prisoner should have received two doses of sodium thiopental through the left arm, two doses of pancuronium bromide through the right arm, and two doses of potassium chloride (one dose through each arm).

Oklahoma's current method of administering the lethal drugs differs from that originally developed by Chapman. The protocol Chapman developed called for a continuous infusion of sodium thiopental and did not split the drugs between the two arms. His protocol also called for observation of the IV site. These protections no longer exist in the current Oklahoma protocol. It is not clear whether Oklahoma ever executed its inmates using Chapman's protocol, or when and why the changes where made.[135] When Human Rights Watch asked Chapman if he had concerns about the ways states today were administering lethal injection executions, he noted, "The question [of the drugs] being administered properly, that never came up in my mind. I never knew we would have complete idiots injecting these drugs. Which we seem to have."[136]

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[133] See, "Murderer of Three Women in Texas is Executed in Texas," *New York Times*, March 14, 1985, p. 9. In 2004, the Ohio Department of Corrections changed the location of the insertion of the catheter from the execution chamber to the holding cell. The prisoner enters the execution chamber with the catheter already inserted. Email correspondence from Reginald Wilkinson.

[134] Affidavit of Mike Mullin.

[135] E-mail correspondence to Human Rights Watch from Lisa McCalmont, April 10, 2006.

[136] Interview with Chapman.

Missouri is the only state known to use a femoral venous IV, in which the IV is inserted into the femoral vein in the groin area.[137] A small needle is used to inject a local anesthetic. A larger needle is inserted into the femoral vein, and, once blood is obtained, a wire is threaded through the needle into the vein, and the needle is withdrawn. Then the IV catheter is threaded over the wire and into the vein. The catheter is then secured by suture. Little is publicly known about the training and expertise of the execution personnel who perform Missouri's complicated femoral IV access executions. While the limited public record indicates that a surgeon creates the IV access, it is unclear what their role is in the conduct of the execution.[138] The attempts by condemned prisoners to discover the information through litigation have been rebuffed by the state's refusal to answer questions posed in the plaintiff's depositions and interrogatories.[139]

### *Qualifications of Execution Team*

Most lethal injection protocols say little or nothing at all about the training, credentials, or experience required of persons who will be on the execution team, either the person who inserts the catheter or the persons responsible for injecting and monitoring the drugs. No state lethal injection protocol expressly requires the team to include an anesthesiologist or someone with training in anesthesiology.

Twelve state lethal injection protocols contain no reference at all to the qualifications of the executioners.[140] Eight protocols refer generally to "training," "competency,"

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[137] See Testimony of Dr. Mark Dershwitz, Transcript, *Taylor v. Crawford*, 05-4173-CV-S-FJG, January 30, 2006, http://www.mhb.com/profiles/ford/cases/PDF%20Docs/Consult-Lethal%20Injection/Taylor%20(Missouri)/01302006%201600%20Transcript%20of%20Snap%20Hearing%20w%20Drs%20Dershowitz%20&%20Groner.pdf (retrieved March 22, 2006). A Kentucky Circuit Court recently found that jugular vein catheterization violates the Eight Amendment, *Baze v. Rees*, No. 04-CI-01094, slip opinion, p. 11-12 (Kentucky Circuit Court, July 8, 2005).

[138] Brief of Appellant-Plaintiff, *Taylor v. Crawford, et al.*, No. 06-1397, February 24, 2006, p. 33-34. See also Defendant Crawford's Answers to Plaintiff's First Interrogatory, *Taylor v. Crawford*, Case No. 05-4173-CV-C-SOW, September 12, 2005, p. 14-15.

[139] Ibid.

[140] Arizona: "Arizona State Prison Complex—Florence, Execution Information" (copy on file with Human Rights Watch); Arkansas: "Arkansas Department of Corrections Procedure for Execution," (copy on file with Human Rights Watch); Delaware: Department of Corrections Execution Information, e-mail correspondence with Denno, April 5, 2006; Idaho: "Execution Procedures," *Idaho Department of Corrections Policy and Procedures Manual*, Section 135, January 2004, p. 4 (copy on file with Human Rights Watch); Indiana: "Summary of Execution Procedures in the State of Indiana," *Indianoplis Star*, http://www2.indystar.com/library/factfiles/crime/capital_punishment/deathrow.html#history (retrieved April 6 2006); Kansas: Kansas Department of Corrections LCF General Order 10,120, February 5, 2001 (copy on file with Human Rights Watch), confirmed current in Human Rights Watch telephone interview with Francis Breyne, public information officer, Kansas Department of Corrections, March 30, 2006; Maryland: Department of Corrections Execution Information, e-mail correspondence with Denno, April 5, 2006; Mississippi: e-mail correspondence with Denno, April 5, 2006 (confirming they mention only "executioners" in their protocol); New Mexico: Penitentiary of New Mexico Policy #073400, revised May 30, 2001 (copy on file with Human Rights

"preparation," or "practice," but they do not elaborate further.[141] For example, North Carolina's protocol states: "Appropriately trained personnel enter behind the curtain." But it does not explain what would constitute appropriate training.[142] According to Texas's protocol, "a medically trained individual (not to be identified) shall insert an intravenous catheter into the condemned inmate's arms."[143] The frequent problems Texas executioners have had with the insertion of catheters certainly raises questions about the actual training of the individuals who insert the catheter. (See Chapter Six on "Botched Executions" for descriptions of such problems.) Texas's protocol does not refer to the qualifications of any other participants in the execution. California's protocol states: "The angiocath shall be inserted into a usable vein by a person qualified, trained, or otherwise authorized by law to initiate such a procedure."[144] Again, like Texas, there is no reference to qualifications of other members of the execution team. Similarly, Florida's protocol does not refer to the qualifications of the execution team members. Florida does require the presence of a doctor and a physician's assistant in the room, but their role in the execution is not clear.[145] What is known is that Florida pays its executioner, described only as a "private citizen," $150 for each execution. Florida recruits its executioners by advertising in local newspapers.[146]

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Watch); South Carolina: Department of Corrections Lethal Injection Information, e-mail correspondence with Denno, April 5, 2006; Virginia: Brief for Amicus Curiae of Darikk DeMorris Walker in support of Petitioner, *Hill v. McDonough; et al.*, March 6, 2006, http://www.law.berkeley.edu/clinics/dpclinic/pdf/Hill/2006.03.06%20amicus%20walker.pdf (retrieved April 5, 2006); Washington: Washington Department of Corrections, "Capital Punishment," *Department of Corrections Policy*, No. 490.200 and 760.001, April 25, 2001 (copy on file with Human Rights Watch).

[141] California: San Quentin Procedure No. 770, revised March 8, 2006 (copy on file with Human Rights Watch); Colorado: Colorado Department of Corrections Administrative Regulation No. 300-14, August 1, 2005, http://www.doc.state.co.us/admin_reg/PDFs/0300_14.pdf (retrieved April 5, 2006) ("thoroughly trained execution team"); Connecticut: State of Connecticut Department of Corrections Directive No. 6.15, October 19, 2004, http://www.ct.gov/doc/lib/doc/pdf/ad/ad0615.pdf (retrieved April 5, 2006) ("appropriately trained and qualified"); Illinois: e-mail correspondence to Human Rights Watch from Deborah Denno, April 5, 2006 ("a trained person shall insert the catheter"); Montana: Montana Department of Corrections Policy No. Doc. 3.6.1, http://cor.mt.gov/resources/POL/3-6-1.pdf (retrieved April 5, 2006) ("trained execution team"); New York: New York State Department of Corrections, "Procedures for the Operation of the Capital Punishment Unit Green Haven Correctional Facility," Section V, points. A-C, p. 7, August 3, 2001 (copy on file with Human Rights Watch) ("qualified individuals proficient in starting and administering IV fluids"); North Carolina: North Carolina Department of Correction, "Execution Method," http://www.doc.state.nc.us/dop/deathpenalty/method.htm (retrieved April 5, 2006) ("appropriately trained personnel"); Oklahoma: Affidavit of Mike Mullin ("trained personnel"); Oregon: e-mail correspondence with Denno, April, 5, 2006 ("medically trained individual").

[142] North Carolina Department of Correction, "Execution Method."

[143] Texas Department of Criminal Justice Institutional Division, Public Information Office, "Execution Procedures of Inmates Sentenced to Death," April 23, 2001, p. 2 (copy on file with Human Rights Watch).

[144] San Quentin Operational Procedure No. 770, p. 39.

[145] *Sims v. State*, 754 So.2d 657, 666 n. 17.

[146] Associated Press, "Sims dies by lethal injection; switching from electrocution," *Florida Times Union*, February 23, 2000. See also, Florida Corrections Commission, "Execution Methods Used by States."

Even though not expressly included in their protocols, a number of states have disclosed the qualifications of at least some of their execution personnel. In Pennsylvania, Colorado, and Georgia, for example, the corrections departments use trained Emergency Medical Technicians (EMTs) to insert the catheter.[147] Ohio uses an EMT and a phlebotomist to start the IVs, and an EMT administers the medication.[148] Tennessee uses two paramedics to insert the IVs.[149] Oklahoma uses a phlebotomist to insert the IVs.[150]

Emergency Medical Technicians may be trained to insert catheters, but they are not ordinarily trained in the intravenous administration of anesthesia. Indeed, they may not even have a basic knowledge of the nature of the drugs they will administer. For example, Louisiana EMTs who administer the drugs during lethal injection executions have revealed they knew nothing about the drugs used in the procedure, including the anesthetic.[151] The warden of Louisiana's State Penitentiary, who is responsible for ensuring that the EMTs involved in Louisiana's execution are qualified to perform lethal injection executions, recently stated that he has "no clue" as to whether the EMTs on his lethal injection execution team have been trained in intravenous administration of anesthesia.[152] North Carolina's Secretary of the Department of Corrections has acknowledged that he is ultimately responsible for his state's lethal injection executions.[153] Yet when asked about the medical qualifications of the execution team, he stated: "I don't know what—I would assume a nurse at least or someone else who is certified to insert a needle."[154]

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[147] Interview with Beard. Interview with Atherton. In Colorado, the Emergency Medical Technicians (EMTs) are full-time, non-medical correctional officers at the corrections department who work part-time as EMTs in the community. Georgia's use of EMTs is mentioned in: *Georgia Department of Corrections Report on the History of Georgia's Death Penalty*, http://www.dcor.stat.ga.us/pdf/TheDeathPenaltyinGeorgia.pdf (retrieved April 5, 2006).

[148] E-mail correspondence from Reginald Wilkinson.

[149] Petitioner's Brief, *Abdur'Rahman v. Bredesen, et al.,* February 15, 2006, p. 2.

[150] Affidavit of Mike Mullin.

[151] The ignorance of the executioners in Louisiana was vividly displayed at a special hearing. Special Hearing, *Code v. Cain*, Case. No. 138,860A, September 16, 2003, excerpt testimony from anonymous trial witnesses: excerpt from John Doe #1, leader of the IV team, p. 15-16; excerpt from John Doe #2, assistant on IV team, p. 16; excerpt from John Doe #4, assistant on IV team, p. 17-18. For example, in response to a question about the effect of sodium thiopental, John Doe #1, the leader of the IV execution team responded, "I read the literature that came with the product when we got it for the lethal injections. That's been 12 years ago. I have no idea." The attorney for the defendant asked: "So to summarize, would you say that it's correct that you have not had a lot of training about the pharmacology of barbiturates or sodium pentothal; is that right? A: Read the literature and went over it with the pharmacist and talked to our medical director about it. Q: What do you recall from those conversations? A: Nothing." Ibid.

[152] Testimony of Warden Richard Peabody, *Code v. Cain*, p. 108.

[153] Testimony of North Carolina Department of Corrections Secretary Theodis Beck, *Page, et al. v. Beck, et al.*, Case No. 5:04-CT-04-BO, August 31, 2005, p. 80.

[154] Ibid., p. 99.

The absence of appropriate medical training extends to something as basic as strapping the prisoner correctly. If the straps used to secure an inmate to the gurney are improperly secured, they can stop the delivery of the drug from the intravenous site in the prisoner's arm to the prisoner's brain.[155] A member of Louisiana's execution strap-down team acknowledged he had never received any training from medical personnel about how to fasten the straps without restricting the prisoner's circulation.[156] One of the botched executions in Chapter Six, below, exemplifies the problem of too-tight straps.

### *Checking the IV Equipment*

Because problems in drug delivery systems and equipment malfunction can lead to the ineffective administration of anesthesia, the American Society of Anesthesiologists (ASA) emphasizes the importance of having medical personnel check the functioning of the anesthesia delivery system every time it is going to be used.[157] The ASA stresses the importance of having a checklist protocol for the anesthesia machines and equipment, to assure that the desired doses of anesthetic drugs will be delivered.[158] We do not know how many states check their intravenous equipment before using it for executions, nor do we know the qualifications of the persons who do the checking. A warden in North Carolina admitted that, while his execution teams do have a checklist protocol, it is "not used or practiced. I don't know the last time [it] was actually used."[159]

The nature of the set up in execution chambers also increases the possibility of problems with the equipment. All the lethal injection drugs are administered from behind a screen or wall several yards away from the prisoner. The length of the intravenous tubing itself is thus problematic, because it requires multiple IV extension sets and connectors, increasing the risk of kinks and leaks.[160]

The ASA (in its Practice Advisory) underscores the importance of having an anesthesiologist near the patient to in order to verify that the intravenous access equipment, including its infusion pumps and connections, are properly functioning and

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[155] Interview with Heath, March 6, 2006.

[156] Testimony of Johnny Butler, former member of a Louisiana State Penitentiary Execution Team, Special Hearing, *Code v. Cain,* No. 138,860-A, February 10, 2003, p. 76.

[157] ASA Advisory, p. 9.

[158] Ibid., p. 10.

[159] Testimony of Warden Richard Polk, *Page, et al. v. Beck, et al.*, Case No. 5:04-CT-04-BO, August 31, 2005, p. 114.

[160] Declaration of Dr. Mark Heath, Affidavit, *Morales v. Hickman*, January 12, 2006, p. 11-12.

to visually monitor the flow of the anesthesia into the veins.[161] In lethal injection executions, however, such monitoring is not possible because of the distance of the execution team from the equipment. For example, because of the distance, the executioners cannot immediately determine if the anesthesia is leaking into the surrounding muscle tissue because of an improperly inserted or secured needle.[162]

### *Level of Anesthesia Not Monitored*

Finally, and most crucially, corrections agencies do not permit anyone to monitor the prisoner's level of anesthesia before the second and third drugs are administered. Standard medical—and even veterinary—practice requires a hands-on determination of the depth of anesthesia of the patient, or of an animal, before the initiation of any painful procedures.[163] Yet during lethal injection executions there is no one, much less someone trained in anesthesia, who either ascertains a prisoner's sedation level before the next two painful drugs are administered, or who continuously monitors the inmate's consciousness levels throughout the execution until the prisoner has died. Similarly, there is no one who can make necessary adjustments to dosage amounts, should a problem emerge.[164]

Many condemned prisoners fall within a category of persons the American Society of Anesthesiologists has deemed most at risk of experiencing intraoperative awareness because of a history of past intravenous drug use, obesity, and other factors of poor health.[165] When a paralytic agent such as pancuronium bromide is used in surgery on such persons, it is especially important that anesthesiologists carefully monitor the delivery and the patient's reaction to the anesthesia to ensure the patient is unconscious.[166]

The patient's depth of anesthesia during surgery is typically assessed by a number of factors, including but not limited to the patient's motor functions, responses to noxious stimuli, and reflexive responses.[167] The ASA warns that when a neuromuscular blocking agent is used in combination with anesthesia, it will mask a patient's response to stimuli,

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[161] ASA Advisory.

[162] Ibid.

[163] American Society of Anesthesiologists, "ASA Standards for Basic Anesthesia Monitoring," revised October 25, 2005, http://www.asahq.org/publicationsAndServices/Standards/02.pdf (retrieved March 31, 2006); *2000 Report of the AVMA Panel on Euthanasia*.

[164] ASA Advisory, p. 15.

[165] Ibid., p. 7-8.

[166] Ibid.

[167] Ibid., p. 21-23.

making it harder for a trained anesthesiologist to determine whether he is appropriately anesthetized or just paralyzed and unable to signal consciousness.[168] In such situations, the anesthesiologist monitors anesthetic depth through "a continuous real-time assessment of an array of physical signs and monitor signals, which may include the patient's heart rate, systolic blood pressure, diastolic blood pressure, EKG waveform, EEG waveform, pupil size, and anesthetic gas concentrations, which then must all be related to the intensity of the ongoing surgical stimulation. Such monitoring is part science and part art, and it takes a considerable amount of hands-on training and experience."[169] Despite the critical importance of this monitoring to ensuring a pain free execution, Human Rights Watch is not aware of any state that requires it.

In North Carolina, the warden in charge of overseeing lethal injection executions did not doubt that prisoners were sufficiently anesthetized when the other drugs were administered. During a deposition, the warden said he could tell the prisoners were anesthetized because: "At the time we administer Pavulon, the inmate is snoring deeply. It is obvious that he's asleep and unaware . . . In 24 executions, I have never seen one that did not snore."[170] The deposition continued:

> Q: And the snoring is the key for you?
>
> A: Yes.
>
> Q: Is there anything else done to determine the level of unconsciousness at the time the Pavulon is administered other than to note the snoring?
>
> A: Is there anything else done?
>
> Q: Is there any other procedure used or anything else done to determine the level of consciousness at the time the Pavulon is administered?
>
> A. No.[171]

The Secretary of the Pennsylvania Department of Corrections told Human Rights Watch that during lethal injection executions, the condemned inmate's head is near the window through which the executioners can see him. This way, the executioners can see that the inmate looks asleep when they administer the other two drugs following the

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[168] Ibid., p. 2.

[169] E-mail correspondence to Human Rights Watch from Heath, March 16, 2006.

[170] Deposition of Marvin Polk, *Page, et al. v. Beck, et al.*, Case No. 5:04-CT-04-BO, August 31, 2006, p. 39-40. The warden also said that he asked the condemned prisoner to count backwards; when they stopped counting, that was how the warden knew the condemned inmate was anesthetized.

[171] Ibid., p. 40.

anesthesia.[172] Yet according to Dr. Peter Sebel, an expert on measuring anesthetic depth in patients during surgery, "snoring" or "whether the patient appears to be asleep" are "not adequate measures of anesthetic depth."[173]

Corrections officials have not publicly explained why no one with appropriate training remains alongside the prisoner to determine the effectiveness of the anesthesia before the other drugs are administered. Maybe they want to protect the anonymity of members of the execution team. But their identities can be hidden from the public through surgical caps and masks, standard issue uniforms and shoes. Maybe they want to spare someone who is participating in an execution from having to stand in intimate proximity to the person being killed. Human Rights Watch recognizes that standing alongside a person being killed would—indeed should—be emotionally difficult. But corrections agencies should not put prisoners at risk of pain simply to spare the feelings of the executioners.

[172] Interview with Beard.

[173] E-mail correspondence to Human Rights Watch from Dr. Peter Sebel, professor and vice-chair, Department of Anesthesiology, Emory University School of Medicine, April 4, 2006.

## IV. Physician Participation in Executions and Medical Ethics

States present lethal injections as a quasi-medical way of executing the condemned. New Jersey law goes so far as to refer to the lethal chemicals as "execution medications."[174] But executions are not medical procedures, and professional ethics prohibit doctors from participating in them. Indeed, it was the growing practice of lethal injection executions that prompted the medical community to clarify and solidify its position that physician participation in executions violates the ethical precepts of the profession.

The prohibition against physician participation in executions is rooted in the medical ethics of a profession committed to the principles of non-malfeasance (the avoidance of causing harm) and beneficence (the affirmative provision of good).[175] The American Medical Association's "Code of Ethics" states: "A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."[176] The AMA defines the prohibited participation to include monitoring vital signs, attending or observing as a physician, rendering technical advice regarding executions, selecting injection sites, starting intravenous lines; prescribing, preparing, administering or supervising the injection of drugs; inspecting or testing lethal injection devices; and consulting with or supervising lethal injection personnel. Under the AMA Code, the only permissible participation by a physician in an execution would be to provide a sedative to a prisoner upon his request prior to his execution and to certify the prisoner's death after another person has pronounced it.[177] The code of ethics for the Society of Correctional Physicians states: "The correctional health professional shall not be involved in any aspect of execution of the death penalty."[178] The American Nurses Association has adopted a similar provision, stating: "When the health care professional serves in an execution under circumstances that mimic care, the healing purposes of health services and technology become distorted."[179]

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[174] "Preparation of Execution Substances and Medications," New Jersey Administrative Code Title 10A, Section 23-2.13.

[175] See, generally, American College of Physicians and Human Rights Watch, "Chapter 5: Medical Ethics and Physician Involvement," *Breach of Trust* (New York: Human Rights Watch 1994).

[176] American Medical Association, "Code of Ethics," Article 2.06, 1992 (copy on file with Human Rights Watch).

[177] Ibid.

[178] Society of Correctional Physicians, "Position Statement on Licensed Health-Care Providers in Correctional Institutions," http://www.corrdocs.org/resources/position.html#resolutions (retrieved April 2, 2006).

[179] American Nurses Association, "Ethics and Human Rights Position Statement: Nurse's Participation in Capital Punishment," December 8, 1994, http://nursingworld.org/readroom/position/ethics/prtetcptl.htm (retrieved April 5, 2006).

Despite medical ethics, twenty-eight states require a physician to determine or pronounce death during an execution.[180] Nine states require the presence of a physician without indicating the purpose of the physician's presence.[181] "One can only surmise that medical expertise is desired by those states to ensure that the execution runs smoothly, i.e., to respond in case something goes awry, or to pronounce death."[182] Some state rules call specifically for a more direct role for physicians. For example, in Oregon, departmental procedures specify that the physician "will be responsible for observing the execution process and examining the condemned after the lethal substance(s) has been administered to ensure that death is induced."[183] California regulations require physicians to fit the heart monitor to the condemned inmate and to monitor the inmate's heart. In Oklahoma, the original protocol devised by Chapman required a physician to inspect the catheter and monitoring equipment and to make certain the fluid would flow into the inmate's vein. That provision is not present, however, in the current Oklahoma protocol.[184]

Physicians have, in fact, participated directly in the execution process itself. In 1990, three physicians administered the first lethal injection execution in Illinois.[185] For a number of years, anesthesiologists injected the drugs in Arizona's lethal injection executions, although that function is no longer undertaken by a doctor.[186] During Texas's first lethal injection execution, Dr. Ralph Gray, the state prison medical director, was present, along with Dr. Bascom Bentley, a physician in private practice, to pronounce the prisoner's death. They watched as execution team members struggled to

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[180] American College of Physicians and Human Rights Watch, *Breach of Trust*, p. 32. The AMA distinguishes between "pronouncing" death, which they consider unethical, and "certifying" death, which is acceptable. The difference is that the former involves monitoring the condition of the prisoner during the execution to determine at which point the individual has died; whereas certifying is confirming the individual is dead after another has pronounced it. Council on Ethical And Judicial Affairs, "Physician Participation in Capital Punishment," *Journal of the American Medical Association*, 1993, p. 270, 365-368.

[181] American College of Physicians and Human Rights Watch, *Breach of Trust*, p. 32.

[182] Ibid.

[183] Oregon Department of Corrections, "Capital Punishment Death by Lethal Injection," Rule No. 24 (Tab 66), OAR 291-24-045, quoted in American College of Physicians and Human Rights Watch, *Breach of Trust*, p.18-19.

[184] Ibid. See also: Affidavit of Mike Mullin; e-mail from Lisa McCalmont.

[185] American College of Physicians and Human Rights Watch, *Breach of Trust*, p. 10

[186] Interview with Myers.

find intravenous access.[187] Eventually, the team convinced Gray to examine the prisoner and point out the best injection site.[188] Gray had also watched the warden mix the chemical agents. When the warden tried to push them through the syringe, he saw that because the warden had accidentally mixed all the chemical agents together, they had "precipitated into a clot of white sludge."[189] When Gray went to pronounce the prisoner dead, he found the prisoner was still alive. Gray and Bentley suggested allowing more time for the drugs to circulate.[190]

More recently, a physician, who requested that his name and state remain anonymous, described three lethal injection executions where the execution technicians were having a hard time finding a vein to establish an intravenous line, because the prisoners were obese or had a past history of intravenous drug use, or both.[191] Although present to monitor the EKG machine and pronounce death, the physician was called upon to help establish an intravenous line after the technicians had tried to do so for thirty minutes without success.[192] During another execution in which the technicians could not find a vein, the physician also could not, and, in the end, he needed to place a central line—a complex and highly technical procedure which involves inserting the catheter in one of the deep large veins in the groin, chest, or neck.[193]

As the above examples suggest, executions can and do go awry, and it is not clear what would happen sometimes if physicians were not present. As one doctor who has certified the deaths of executed inmates noted, "If the doctors and nurses are removed, I don't think [lethal injection] could be competently or predictably done."[194]

Although there are exceptions, there is strong resistance in the medical profession to directly contributing to the "success" of an execution. Even doctors who work for

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[187] Atul Gawande, "When Law and Ethics Collide—Why Physicians Participate in Executions," *New England Journal of Medicine*, Vol. 354, No. 12, March 23, 2006, p. 1221-1229, http://content.nejm.org/cgi/content/full/354/12/1221?hits=20&where=fulltext&andorexactfulltext=and&searchterm=%22Lethal+injection%22&sortspec=Score%2Bdesc%2BPUBDATE_SORTDATE%2Bdesc&excludeflag=TWEEK_element&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT (retrieved April 5, 2006). The involvement of physicians in lethal injection executions is discussed more fully in American College of Physicians and Human Rights Watch, *Breach of Trust*.

[188] Gawande, "When Law and Ethics Collide."

[189] Ibid. The article does not explain whether new syringes were then prepared.

[190] Ibid.

[191] Ibid.

[192] Ibid.

[193] Gawande, "When Law and Ethics Collide." For information about central line access: e-mail correspondence to Human Rights Watch from Heath, April 5, 2006.

[194] Gawande, "When Law and Ethics Collide."

correctional agencies have refused to participate in executions, sometimes at considerable professional cost.[195] In Colorado, for example, the medical staff at the Department of Corrections refused "to have anything to do with the executions," which is why the state uses EMTs to insert the catheter and inject the drugs.[196]

Human Rights Watch recognizes that the ethical prohibition on physician participation in executions limits the way states can conduct lethal injection executions. This is a dilemma of the states' making—by their refusal to abolish capital punishment—and it is a dilemma states must resolve if they continue to use lethal injection executions. For example, alternative methods of lethal injection have been suggested that would negate the need for anesthesiologists to monitor levels of unconsciousness. Some states are considering legislation to prevent physician liability for participating in executions in breach of medical ethics, in the hopes this will facilitate their participation in executions.[197] It is up to state legislators and corrections agencies to determine how to proceed, but they must do so respecting the human rights injunction to use the execution methods that will cause the least possible pain and suffering.

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[195] For examples of corrections medical staff refusing to participate, see: American College of Physicians and Human Rights Watch, *Breach of Trust*, p.26-29.

[196] Interview with Atherton. EMTs apparently are not subject to the same ethical restrictions as physicians.

[197] Georgia House Bill 57 (2006) proposes: "Participation in any execution of any convicted person carried out under this article shall not be the subject of any licensure challenge, suspension, or revocation for any physician or medical professional licensed in the State of Georgia." (copy on file with Human Rights Watch). Oklahoma House Bill 2660 proposes: "No licensing entity, board, commission, association, or agency shall file, attempt to file, initiate a proceeding, or take any action to revoke, suspend, or deny a license to any person authorized to operate as a professional in the State of Oklahoma, for the reason that the person participated in any manner in the execution process as required or authorized by law or the Director of the Department of Corrections" (copy on file with Human Rights Watch).

## V. Case Study: *Morales v. Hickman*

In *Morales v. Hickman*, California prisoner Michael Angelos Morales sought a stay of execution so the court could conduct a full evidentiary hearing on his Eighth Amendment challenge to the state's lethal injection procedures.[198] Morales was able to present to the court far more compelling and extensive evidence regarding possible problems in prior California executions by lethal injection than any other court in California or elsewhere had previously received, including six California execution logs, which suggested the prisoners were still breathing, and conscious, while the other drugs were administered.[199]

Troubled by the evidence, the court took the unusual step of telling the corrections department it could go ahead with the execution only if it changed its protocol for executing Morales in one of two ways: either administer a single massive dose of a barbiturate, or have "a 'qualified individual' with formal training and experience in the field of general anesthesia" ensure that Morales was in fact unconscious before any other drugs were injected.[200] The court in *Morales* also urged the state to "conduct a thorough review of its lethal injection protocol, regardless of whether Morales is executed according to one of the court's suggested methods."[201] The court pointed out that, given the questions raised by Morales and others before him, a "proactive approach by Defendants would go a long way toward maintaining judicial and public confidence in the integrity and effectiveness of the protocol."[202]

The Department of Corrections chose the option of executing Morales using the three-drug protocol subject to the condition of having a qualified person monitor Morales to determine his anesthetic depth before the other drugs were initiated. The Department initially proposed the warden of San Quentin as the person to determine whether Morales was sufficiently unconscious, even though the warden had no medical or

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[198] See Plaintiff's Motion for Temporary Restraining Order, *Morales v. Hickman*, Case No. C062, January 26, 2006.

[199] Due to ongoing litigation, some of the Plaintiff's Exhibits are under court seal. Those Plaintiff's Exhibits that are public record are available online at: http://www.ca9.uscourts.gov/ca9/Documents.nsf/54DBE3FB372DCB6C88256CE50065FCB8/E0489B00C2CB5906882571190006A91E?OpenDocument#06-70884 and http://www.ca9.uscourts.gov/ca9/Documents.nsf/54DBE3FB372DCB6C88256CE50065FCB8/E0489B00C2CB5906882571190006A91E?OpenDocument#06-99002 (retrieved March 24, 2006).

[200] U.S. District Court for the Northern District of California, Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, *Morales v. Hickman*, Case No. C062, February 14, 2006.

[201] Ibid., p.13.

[202] Ibid.

otherwise relevant background.[203] When the public spokesperson for the California Attorney General, responding to press inquiries about the *Morales* case, was asked if the Department of Corrections felt the warden was qualified to monitor the anesthetic depth of Morales during his execution, he replied, "Well, not to a medically-trained standard, but yes to a lay-person standard."[204]

The proposal to have the warden monitor Morales was quickly rejected by the judge. The Department then found two anesthesiologists willing to be present at the execution.[205] The two withdrew after the Court of Appeals for the Ninth Circuit added a stipulation requiring the anesthesiologists personally administer additional medication if the prisoner remained conscious or was in pain.[206] In the end, no trained personnel could be found to undertake the role envisioned by the courts, and the execution was stayed when California refused to execute Morales with a massive dose of sodium thiopental.[207] When Human Rights Watch asked the California Attorney General's public spokesperson why the corrections department did not choose the sodium thiopental option, he responded, "[The execution] would take too long."[208]

The judge has ordered a full evidentiary hearing on California's lethal injection procedures for May 2 through 3, 2006.[209]

In the meantime, California corrections officials continue to tinker with their execution protocols. In March, the Department of Corrections abruptly announced changes to its protocol: the sodium thiopental will be administered in a continuous drip, rather than a

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[203] Human Rights Watch telephone interview with Nathan Barankin, spokesperson for the California Attorney General Bill Lockyer, March 30, 2006.

[204] Ibid.

[205] Defendant's Response to Court's Conditional Denial of Preliminary Injunction, *Morales v. Hickman*, Case No. C062, February 15, 2006.

[206] *Morales v. Hickman*, No. CV 06 00926 JF (Ninth Circuit February 20, 2006); John Broder and Carolyn Marshall, "Questions Over Method Lead to Delay of Execution," *New York Times*, February 2, 2006, p. A11.

[207] "Statement of California Department of Corrections and Rehabilitation Warden Steven Ornoski," issued February 21, 2006, http://www.cya.ca.gov/communications/moralesexecutiondelay.html (retrieved April 4, 2006) (the warden explains that the state cannot comply with the judge's orders and thus has called off the execution of Morales). The judge's order said the state could proceed with the execution on February 21 under the two conditions mentioned above, or—if the state did not execute Morales on February 21—a stay would be issued by order of the court for purposes of holding an evidentiary hearing on the constitutionality of lethal injection. *Morales v. Hickman*, U.S. District Court for the Northern District of California, Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, Case No. C062, February 14, 2006.

[208] Interview with Barankin.

[209] Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction, U.S. District Court for the Northern District of California, *Morales v. Hickman*, Case No. C062, February 14, 2006.

single dose of anesthesia, and the dosage of each of the three drugs has been reduced.[210] The rational for the lowered doses is not clear. The changes were a result of consultations with corrections department staff and did not involve outside medical experts.[211] California officials claim the litigation and discussions about prior executions provided an impetus to revisit the protocol and make changes that will render the method of execution "equally safe but more effective."[212] At the same time, California officials contend that they need not choose the "best" method of lethal injection or prove their lethal injection executions are humane—that burden of proof is on California's condemned inmates.[213] The state may be correct as a matter of current constitutional jurisprudence. But the state's position displays a stunning callousness for prisoners facing execution as well as utter disregard for its human rights responsibilities.

On April 7, 2006, citing the example of *Morales*, a federal judge in North Carolina ordered that an execution there could only take place as scheduled:

> [O]n the condition that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride.[214]

The court also ordered the "execution personnel with sufficient medical training" present to provide "appropriate medical care" if the prisoner "exhibits effects of consciousness."[215] The court was disturbed by eyewitness accounts of prisoners' violent physical movements after the administration of the lethal injection drugs began, and by recent toxicology reports that suggest prisoners may not have been sufficiently anesthetized during their lethal injection executions.[216]

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[210] Ibid.

[211] Ibid.

[212] Ibid.

[213] Ibid.

[214] Order, *Brown v. Beck*, No. 5:06-CT-3018-H, April 7, 2006, p. 14 (copy on file with Human Rights Watch).

[215] Ibid.

[216] Ibid., p. 8-10.

## VI. Botched Executions

A number of lethal injection executions have gone terribly, visibly wrong. Michael Radelet, a professor of sociology and law, has compiled a list of thirty-six "botched executions," which he defines as executions where there is the appearance of "prolonged suffering" on the part of the condemned inmate "for twenty minutes or more."[217] Because states do not make public, maintain, or even keep records of their executions (see the "U.S. Constitutional Law" section of Chapter Seven), this list was developed from media reports. There may be other botched executions that were never reported. In addition, there is no way to know how many prisoners killed by lethal injections suffered needlessly, but invisibly, because of inadequate anesthesia masked by a neuromuscular blocking agent.

Lethal injection executions where the condemned inmate's suffering was visible to the witnesses include:

- **Stephen Peter Morin,** executed in Texas on March 13, 1982. Execution technicians probed Morin's veins over and over again for forty-five minutes before they found a suitable vein to establish an intravenous line. Like many death row inmates, Morin had a history of injection drug abuse that had left his veins compromised, making them difficult to penetrate with a needle.[218]

- **Raymond Landry**, executed in Texas on December 13, 1988. Two minutes after the injection of the drugs into Landry began, the catheter dislodged out of his vein and flew through the air. Officials pulled the curtain separating the witnesses from the inmate. Operating from behind the curtain, it took the execution team fourteen minutes to reinsert the catheter into the vein. Witnesses reported hearing at least one "groan" from Landry from behind the curtain. Twenty-four minutes after the intravenous drugs were injected, and forty minutes after being strapped to the execution gurney, Landry was pronounced dead. A spokesperson for the Texas Department of Criminal Justice explained afterwards, "There was something of a delay in the execution because of what

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[217] See Michael Radelet, "Post-Furman Botched Executions," http://deathpenaltyinfo.org/article.php?scid=8&did=478 (retrieved April 5, 2006). Also: Human Rights Watch telephone interview with Michael Radelet, professor of sociology, University of Colorado at Boulder, Boulder, Colorado, March 1, 2006.

[218] "Murderer of Three Women is Executed in Texas," p. 9.

officials called a 'blowout.' The syringe came out of the vein, and the warden ordered the team to reinsert the catheter into the vein."[219]

- **Stephen McCoy**, executed in Texas on May 24, 1989. McCoy had a violent physical reaction to the lethal injection drugs. During the execution, his chest heaved up and down as he gasped for breath, choked, and arched his back up and off the gurney. The Texas Attorney General admitted that the inmate "seemed to have a somewhat stronger reaction," than other executed prisoners, adding "The drugs might have been administered in a heavier dose and more rapidly."[220]

- **Charles Walker**, executed in Illinois on September 12, 1990. According to Gary Sutterfield, an engineer from Missouri State Prison retained by the State of Illinois to assist in Walker's execution, a kink in the plastic tubing going into the inmate's arm stopped the chemicals from reaching Walker. In addition, the intravenous needle was incorrectly inserted pointing at Walker's fingers instead of his heart. The incorrect insertion delayed the flow of drugs to Walker's heart, prolonging the execution.[221]

- **Ricky Ray Rector**, executed in Arkansas on January 24, 1992. It took medical staff, with Rector's help, more than fifty minutes to find a suitable vein in Rector's arm. The curtain remained closed between Rector and the witnesses, but some reported they could hear Rector moaning. The administrator of the State Department of Corrections Medical Program said "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein. That may have contributed to his occasional outbursts." The state later attributed the difficulty in finding a suitable vein to Rector's heavy weight and to his use of an antipsychotic medication.[222]

- **John Wayne Gacy**, executed in Illinois on May 10, 1994. After the execution began, the chemicals unexpectedly solidified in the IV tube leading to Gacy's arm, clogging it, and stopping the chemicals from flowing to his vein. Officials

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[219] "Landry Executed for '82 Robbery-Slaying," *Dallas Morning News*, December 13, 1988, p. 29A.

[220] "Witness to an Execution," *Houston Chronicle*, May 27, 1989, p. 11.

[221] "Niles Group Questions Execution Procedure," *United Press International*, November 8, 1992.

[222] "Joe Farmer, Rector, 40, Executed for Officer's Slaying," *Arkansas Democrat*-Gazette, January 25, 1992, p. 1B; Sonja Clinesmith, "Moans Pierced Silence During Wait," *Arkansas Democrat Gazette*, January 26, 1992, p. 1B; Marshall Frady, "Death in Arkansas," *The New Yorker,* February 22, 1993, p. 105.

drew the blinds covering the window through which the witnesses were observing the execution, while the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened, and the execution process began again. It took eighteen minutes to complete. In news reports, anesthesiologists blamed the problem on the inexperience of prison officials who were conducting the execution, noting that even simple procedures taught in an "IV 101" class would have prevented the error.[223]

- **Emmit Foster,** executed in Missouri on May 3, 1995. Seven minutes after the lethal chemicals began to flow into Foster's arm, the chemicals stopped flowing through the tube. With Foster gasping and convulsing, the execution was halted, and the blinds covering the window between the witnesses and Foster were drawn. The execution proceeded behind the blinds. Thirty minutes later, Foster was pronounced dead. Three minutes later the curtains were opened so the witnesses could view the corpse. The coroner who pronounced Foster dead explained that Foster had been too tightly strapped to the gurney, restricting the flow of the chemicals into his veins. A corrections staff member, upon the coroner's recommendation, finally loosened the straps, and Foster died several minutes after that.[224]

- **Tommie J. Smith**, executed in Indiana on July 18, 1996. Smith's small veins made it difficult for the execution technicians to find a suitable vein, and a physician was called in. Smith was given a local anesthetic, and the physician twice attempted to insert a catheter into Smith's neck. When that failed, the angio-catheter was inserted in Smith's foot. Only then were witnesses allowed to observe the process. The lethal drugs were finally injected into Smith forty-nine minutes after the first attempts, and it took another twenty minutes before his death was pronounced.[225]

- **Michael Eugene Elkins,** executed in South Carolina on June 13, 1997. Because Elkin's body was swollen from liver and spleen problems, it was difficult for the executioners to locate a suitable vein for the catheter insertion. The executioners ultimately probed for a vein in his neck. Elkins tried to assist

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[223] Rob Karwath and Susan Kuczka, "Gacy Execution Delay Blamed on Clogged IV Tube," *Chicago Tribune,* May 11, 1994, p. 1 (Metro Lake Section).

[224] Tim O'Neil, "Too-Tight Strap Hampered Execution," *St. Louis Post-Dispatch*, May 8, 1995, p. 6B.

[225] Sheri Edwards and Suzanne McBride, "Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy Forbidding Active Role in Execution," *Indianapolis Star*, July 19, 1996, p. A1.

the executioners, asking, "Should I lean my head down a little bit?" as they probed for a vein. After numerous failures, a usable vein was found.[226]

- **Joseph Cannon**, executed in Texas on April 23, 1998. After Cannon made his final statement, the execution process began. A vein in Cannon's arm collapsed and the needle popped out. Seeing this, Cannon lay back, closed his eyes, and exclaimed to the witnesses: "It's come undone." Officials then pulled a curtain back to block the view of the witnesses, reopening it fifteen minutes later, when a weeping Cannon made a second final statement and the execution resumed.[227]

- **Claude Jones,** executed in Texas on December 7, 2000. It took the execution team thirty minutes to find a suitable vein, in part because of Jones's history of drug abuse. Warden Jim Willet, the man in charge of the execution, stated:

  > The medical team could not find a suitable vein. Now I was really beginning to worry. If you can't stick a vein then a cut-down [where a cut is made into the vein to insert the chemicals] has to be performed. I have never seen one and would just as soon go through the rest of my career the same way. Just when I was really getting worried, one of the medical people hit the vein in the left leg.[228]

- **Jose High,** executed in Georgia on November 7, 2001. High was pronounced dead some one hour and nine minutes after the execution began. After attempting to find a useable vein for thirty-nine minutes, the emergency medical technicians under contract to do the execution abandoned their efforts. Eventually, one needle was stuck in High's hand, and a physician was called in to insert a second needle between his shoulder and neck.[229]

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[226] "Killer Helps Officials Find A Vein At His Execution," *Chattanooga Free Press*, June 13, 1997, p. A7.

[227] "1st Try Fails to Execute Texas Death Row Inmate," *Orlando Sentinel*, April 23, 1998, p. A16; Michael Graczyk, "Texas Executes Man Who Killed San Antonio Attorney at Age 17," *Austin American-Statesman*, April 23, 1998, p. B5.

[228] Sarah Rimber, "Working Death Row," *New York Times*, December 17, 2000, p. 1.

[229] Rhonda Cook, "Gang leader executed by injection Death comes 25 years after boy, 11, slain" *Atlanta Journal Constitution*, November 7, 2001, p. B1.

Because of recent litigation in North Carolina challenging that state's lethal injection protocol, evidence of a number of botched executions in that state have recently become public:

- **Willie Fisher**, executed in North Carolina on March 9, 2001. After appearing to lose consciousness, Fisher began convulsing, and his eyes opened. A witness described Fisher as trying to catch his breath, with his chest heaving repeatedly.[230]

- **Eddie Ernest Hartman**, executed in North Carolina on October 3, 2003. As the drugs were being administered, Hartman's throat began alternately thrusting outward and collapsing inward. His neck pulsed, bulged, and shook repeatedly. Hartman's eyes were open, and his body convulsed and contorted throughout the execution until he died.[231]

- **John Daniels,** executed in North Carolina on November 14, 2003. Daniels lay still as the warden announced that the execution would proceed. Then suddenly, he started to convulse. He sat up, and witnesses could hear him gagging through the glass that separated him from them. After laying down again for a brief time, he sat up, gagged, and choked, while his arms appeared to be struggling underneath the sheet covering him.[232]

Even when lethal injections have appeared to proceed smoothly, however, they may nonetheless have involved considerable pain and suffering. The inability to ascertain whether or not more prisoners have suffered during their executions stems from the use of pancuronium bromide, which prevents the prisoners from communicating verbally or physically what they are experiencing. Witnesses to the execution see a person lying quietly; they have no way of knowing whether he is in fact properly anesthetized or whether he is experiencing excruciating pain behind his paralyzed face.

Execution records—e.g., execution logs, autopsies, and toxicology reports—are necessary to conduct accurate post-mortem reviews of how the execution proceeded, including whether the prisoner reached an appropriate level of anesthesia.[233] But

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[230] Order. *Brown v. Beck*, No. 5:06-CT-3018-H, April 7, 2006, p. 9.

[231] Ibid., p. 10.

[232] Ibid.

[233] In April of 2005, a team of medical doctors reported in the British medical journal *The Lancet* that toxicology reports on forty-three of forty-nine executed inmates revealed the anesthetic administered during lethal

corrections agencies have refused to create or keep such records, and agencies have refused to make them publicly available when they have been created or kept.[234] For example, Texas, which has conducted 362 lethal injection executions, the most in the United States,[235] stopped conducting autopsies of its executed prisoners in 1989.[236]

Execution logs from California—the only state in which such records have been made publicly available, and only because of litigation—strongly suggest that lethal injection executions in that state are not going according to plan. When a barbiturate like sodium thiopental is used during surgery, the patient goes limp within seconds after the drug begins flowing into his veins.[237] He may take a few breaths, cough, hiccup, or have some erratic breathing, but there would be no regular and ongoing up and down chest movements.[238] The anesthesia removes the patient's ability to breathe on his own, which is why a doctor will intubate him so that a machine can do his breathing for him during surgery.[239] Yet in California, six recent lethal injection execution logs indicate that prisoners were breathing more than a minute after they should have received a dose of sodium thiopental ten times that used in surgery.[240] According to the execution logs:[241]

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injections was lower than that required for surgery. Indeed, in twenty-one of the inmates, the concentrations of thiopental in the blood were consistent with awareness. The report concludes, "Failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of at least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injection is warranted." G. K. Leonidas, et al., "Inadequate Anesthesia in Lethal Injection for Execution," *The Lancet*, Vol.365 (9468), April 16, 2005, p.1412. Medical experts have subsequently discredited the Lancet report because the blood used in the toxicology analysis was drawn many hours after the execution. To be most accurate, blood used for a toxicology analysis would have to be drawn soon after the prisoner's death. See, e.g., "Study: Lethal Injection Not Painless," *Chicago Tribune*, April 15, 2005, http://www.med.miami.edu/communications/som_news/index.asp?id=470 (retrieved April 2, 2006).

[234] See, for instance, policies in Missouri, Louisiana, and North Carolina: Missouri does not keep any records from its executions (Defendant Crawford's Answers to Plaintiff's First Interrogatory, *Taylor v. Crawford*, Case No. 05-4173-CV-C-SOW, September 12, 2005, p. 24); Louisiana does not keep its execution records for more than five years (Inglis Deposition, p. 57); North Carolina does not keep any execution records either (Testimony of Polk, p.114).

[235] DPIC, "Execution Database."

[236] *Harris v. Johnson, et al.*, April 15, 2004, p. 5.

[237] Interview with Heath, March 6, 2006; Interview with Dershwitz, March 1, 2006.

[238] E-mail correspondence to Human Rights Watch from Dershwitz, March 9, 2006.

[239] Ibid.

[240] Doses of sodium thiopental used in surgery are typically one-tenth the five grams called for in California's lethal injection executions at the time of these six executions. San Quentin Procedure No. 770, p. 32. California has since changed its dosage of sodium thiopental, from five grams to 1.5 grams. See Chapter Five on the *Morales v. Hickman* case.

[241] It is unclear who was responsible for keeping the execution log and what the protocol was for determining when respirations ceased. E-mail correspondence to Human Rights Watch from John Grele, attorney for Morales, April 1, 2006. (Copies of the six execution logs are on file with Human Rights Watch.)

- **Jaturun Siripongs** was executed on February 9, 1999. The administration of sodium thiopental began at 12:04 a.m., and the administration of pancuronium bromide began at 12:08 a.m., *yet breathing did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.*

- **Maunuel Babbitt** was executed on May 4, 1999. The administration of sodium thiopental began at 12:28 a.m., and the administration of pancuronium bromide began at 12:31 a.m., *yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began.*

- **Darrell Keith Rich** was executed on March 15, 2000. The administration of sodium thiopental began at 12:06 a.m., and the administration of pancuronium bromide began at 12:08 a.m., *yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began.*[242]

- **Stephen Wayne Anderson** was executed on January 29, 2002. The administration of sodium thiopental began at 12:17 a.m., and the administration of pancuronium bromide began at 12:19 a.m., *yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.*

- **Stanley Tookie Williams** was executed on December 13, 2005. The administration of sodium thiopental began at 12:22 a.m.; the administration of pancuronium bromide began at 12:28 a.m.; and the administration of potassium chloride began at 12:32 or 12:34 a.m. (there is some discrepancy in the execution log as to when the potassium chloride was administered); *yet respirations did not cease until either 12:28 a.m. or 12:34 a.m. (again there is an inconsistency in the records), either six or twelve minutes after the administration of the sodium thiopental began, either at the same time as or six minutes after the administration of pancuronium bromide began, and*

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[242] The execution log states that Rich's respirations ceased at 12:08 a.m., but notes that Rich had "chest movements" lasting from 12:09 to 12:10 a.m. These chest movements began after Rich had supposedly stopped breathing and three minutes after the administration of the thiopental. The chest movements are "consistent with an attempt to fight off the accruing paralytic effect of the pancuronium." Third Declaration of Dr. Mark Heath, *Morales v. Hickman*, February 9, 2006, p. 6.

*either four minutes before or at the same time as the administration of potassium chloride began.*[243]

- **Clarence Ray Allen** was executed on January 17, 2006. The administration of sodium thiopental began at 12:18 a.m., *yet respirations did not cease until 12:27 a.m., when pancuronium bromide was injected, nine minutes after the administration of sodium thiopental began.*

The logs do not prove that these six men were conscious when the pancuronium bromide and potassium chloride were injected. But the fact that their breathing did not stop when expected suggests adequate doses of sodium thiopental may not have been administered. At the very least, the logs point to the importance in three-drug lethal injection executions of having someone present to establish the level of anesthesia before the second and third drugs are administered.

Eyewitness testimony about lethal injection executions in Texas also raises concerns some prisoners in Texas were breathing after the administration of the sodium thiopental should have paralyzed their lung muscles. Reverend Carroll Pickett witnessed ninety-five lethal injection executions in Texas from 1982 through 1995.[244] As the condemned inmate's spiritual advisor on the day of his execution, Pickett stayed with the inmate throughout the execution until the inmate died. Once the inmate was on the gurney, Pickett stood next to him, his right hand touching the inmate's right knee. During some of the executions, he "saw some of the boys with their eyes open and looking at me after the thiopental came, I felt like I let [the prisoner] down, because the execution was not proceeding exactly as I told [the prisoner]."[245] Human Rights Watch asked Pickett if he signaled anything to the warden when he noticed a prisoner's eyes open. He said no, that it had not been clear to him that something was wrong.[246] When asked if he remembered any of the inmates breathing after the administration of the sodium thiopental, Pickett said that he "did not see any of them stop breathing after that. That just put them to sleep. But they kept breathing. All of them."[247]

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[243] The records are inconsistent. The formal execution log suggests that Williams stopped breathing at 12:28 a.m. and indicates that potassium chloride was injected at 12:32 a.m., whereas the execution team's log states that Williams stopped breathing at 12:34 a.m., when the potassium chloride was injected. It appears that the formal log was altered without any indication as to who made the alteration.

[244] Interview with Pickett.

[245] Ibid.

[246] Ibid.

[247] Ibid.

Pickett did not have any medical training; he had not been asked to monitor the condemned inmates breathing; and the executions were many years ago. Nevertheless, his memory of open eyes and breathing prisoners suggests there in fact may have been serious problems with the way Texas executed its prisoners.

## VII. International Human Rights and U.S. Constitutional Law

### *International Human Rights Law*

The cornerstone of human rights is respect for the inherent dignity of all human beings and the inviolability of the human person. The Universal Declaration of Human Rights, the foundation for human rights law, is premised upon the recognition of "the inherent dignity and ... the equal and inalienable rights of all members of the human family."[248] Human Rights Watch believes the inherent dignity of the person cannot be squared with the death penalty, a form of punishment unique in its cruelty and finality, and a punishment inevitably and universally plagued with arbitrariness, prejudice, and error. While international law does not prohibit capital punishment, the trend in law and practice is for its abolition.

States that do not abolish capital punishment must still abide by human rights standards in their choice of execution methods. The United States is a party to the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[249] While neither treaty prohibits capital punishment, the prohibitions in both against torture and cruel, inhuman, or degrading punishment apply to the manner in which executions are carried out.[250]

Human rights law imposes an obligation on states that impose capital punishment to use methods of execution that minimize pain and suffering. The U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by the Economic and Social Council in 1984, provides that where capital punishment occurs, it shall be "carried out so as to inflict the minimum possible suffering."[251]

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[248] "Preamble," Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

[249] Article 6 of the ICCPR on the right to life discusses the death penalty in countries that have not abolished it. Section 6 states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

[250] The U.N. Human Rights Committee (HRC) has noted that because the ICCPR does not prohibit the imposition of the death penalty in certain limited circumstances, capital punishment is not *per se* a violation of the prohibition on torture and other cruel punishment. Instead it is necessary to consider the facts and the circumstances of each case, including personal factors regarding the condemned person, conditions on death row, and "whether the proposed method of execution is particularly abhorrent." *Kindler v. Canada*, HRC, communication no. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993) (citing *Soering v. United Kingdom*, European Court of Human Rights).

[251] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1) at 33, U.N. Doc. E/1984/84 (1984), safeguard 9, http://www1.umn.edu/humanrts/instree/i8sgpr.htm (retrieved on April 11, 2006).

The Human Rights Committee (HRC), the body of experts that monitors state compliance with the ICCPR, has stated that when the death penalty is applied, "it must be carried out in such a way as to cause the least possible physical and mental suffering."[252] The HRC applied this standard in the case of Charles Chitat Ng, who fought extradition from Canada to the United States because he might face execution by lethal gas.[253] After reviewing evidence concerning the manner by which lethal gas kills and the length of consciousness after asphyxiation begins, the committee concluded that execution by means of lethal gas "would not meet the test of 'least possible physical and mental suffering,'" and it thus was cruel and inhuman.[254]

Similar standards have been adopted elsewhere. The European Union in 2001 adopted guidelines for combating torture that urge countries with the death penalty to ensure that the execution methods used cause the "least possible physical and mental suffering."[255]

International human rights law thus requires public officials to forego an execution method in favor of alternatives that cause less or no suffering. Human Rights Watch also believes the law requires officials to choose the execution method that carries the least "risk" of suffering. If one method inherently has a risk—even a small one—of suffering, it should be eschewed in favor of a method that has no risk, or a smaller risk. In assessing the possibility of pain and suffering, public officials should consider not only risks inherent in a particular procedure, but the likelihood of mistakes or accidents.

Death penalty states do not satisfy their human rights responsibilities simply by choosing lethal injection over, for example, lethal gas. Rather, they must determine whether their particular lethal injection drug protocols and methods of administration cause the "least possible physical and mental suffering" compared to other possible drugs and methods of administration. Exercising human rights responsibilities requires a careful initial assessment, and then continual reassessment of the state of the art regarding anesthesia, analgesic, and death-inducing drugs, and incorporating the best available scientific and medical expertise into drug and administration protocols.

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[252] ICCPR, General Comment 20, U.N. HRC, 44th Session, U.N. Doc ccpr/c/21/Add.3 (1992), p. 6.

[253] See *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/469/1991 (1994), http://www1.umn.edu/humanrts/undocs/html/dec469.htm (retrieved March 24, 2006).

[254] U.N. HRC, 49th Session, UN doc, CCPR/49/D/469 (1991), decision issued January 4, 1994.

[255] European Union, "Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment," adopted by the EU General Affairs Council, Luxembourg, April 9, 2001, http://ue.eu.int/uedocs/cmsUpload/TortureGuidelines.pdf (retrieved March 14, 2006).

Human Rights Watch is not aware of any U.S. death-penalty state that has either met its international human rights obligations with regard to its choice of method of lethal injection or their ongoing use of that method. There is a growing body of evidence, as discussed above, suggesting that the three-drug protocol and methods of administration used by most states carry a foreseeable, albeit unquantifiable, risk of physical and mental suffering beyond that inherent in knowing one is being executed. The risk is not simply that which is inherent in any human endeavor, i.e., inevitable risks of accidents and errors. Rather, the risk exists because of deliberate choices made by public officials, including the specific drugs they have chosen, their failure to require that executioners possess appropriate training and experience, and their choice of haphazard and medically unsound procedures for the administration of the drugs.

Our research indicates that problems with lethal injection executions in the United States reflect the failure of public officials to take the steps necessary to meet international human rights standards:

- State legislators and corrections officials did not develop their lethal injection procedures with the advice and guidance of medical experts and through a process of reasoned scientific inquiry. While the historical record is not complete, it suggests the decision-making processes on the part of corrections officials were informal or hurried, made by persons who themselves had no relevant expertise and who did not consult with persons who did. Copying the procedures of another state—usually Texas—was the prevalent method public officials used in deciding how to execute their prisoners.

- There has been no process of constant and informed revision of lethal injection protocols in light of experience and developments in the fields of anesthetics, analgesics, and lethal drugs. The New Jersey Department of Corrections correctly acknowledged in 2005 that the "state of the art" with regard to the most humane method of lethal injection executions is "continually changing."[256] Yet most states cling to their protocols, fighting judicial challenges and refusing to change.

- Anesthesiologists, other medical experts, lawyers and others have suggested alternative methods of lethal injection that would carry less risk of the condemned inmate experiencing pain and suffering. They have suggested, for

[256] Transcript, New Jersey Department of Corrections Public Hearings on Amendments to New Jersey's Lethal Injection Protocols, February 4, 2005, p. 33 (copy on file with Human Rights Watch).

example: a single massive injections of a powerful barbiturate rather than the complex three-drug cocktail; placing a person trained in anesthetics in the execution chamber with the prisoner to determine whether he or she is deeply anesthetized before the pancuronium bromide and potassium chloride are administered; removing paralytic agents from the drug protocol completely, and replacing potassium chloride with a painless lethal agent to induce cardiac arrest.

Departments of corrections officials have rejected these suggestions. The only explanation we have uncovered for their insistence on using existing drug protocols may be that the current methods better serve the interests of the onlookers—the witnesses and executioners. If nothing goes wrong, the existing drug protocols kill the prisoner in a few minutes. By contrast, death from a single injection of a massive amount of a powerful barbiturate may take half an hour to forty-five minutes. The use of a paralytic agent ensures the prisoner will be perfectly still and apparently peaceful—regardless of whether he is in fact conscious and experiencing pain. When the potassium chloride is administered, his body will not twitch or writhe on the table, as bodies may do when their hearts suddenly stop. Witnesses and those participating in the execution might be troubled by the sight of a prisoner convulsing during his execution. They might think those movements are a sign that the prisoner is experiencing distress—or witnesses may simply find any movement by a prisoner being executed inherently disturbing.

Human Rights Watch understands public officials would like to protect the feelings and sensitivities of the executioners and witnesses. But human rights law requires them to place a higher priority on minimizing the pain and suffering of the condemned prisoners than on the comfort levels of those who do the killing and those who watch.

### *U.S. Constitutional Law*

Under U.S. law, executions are unconstitutional if they "involve the unnecessary and wanton infliction of pain"[257] or "involve torture or lingering death."[258] What constitutes "unnecessary" pain is informed by standards of decency as they evolve "in light of contemporary human knowledge."[259] Where the pain inflicted in an execution results from "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is implicated.[260]

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[257] *Gregg v. Georgia*, 428 U.S. 153 173 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 392 (1972)).

[258] In Re *Kemmler*, 136 U.S. 436, 447 (1890).

[259] *Robinson v. California*, 370 U.S. 660, 666 (1962). See also *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

[260] *Furman*, 408 U.S. at 265 (quoting *Kemmler*, 136 U.S. at 447). The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Methods of execution once viewed as acceptable can, over time, come to offend Eighth Amendment standards, as scientific knowledge and society's norms evolve.[261] As Judge Harry Blackmun explained, "the emphasis [of the Eighth Amendment] is on man's basic dignity, on civilized precepts, and on the flexibility and improvement in standards of decency as society progresses and matures."[262]

Execution methods can violate the Eighth Amendment even though they are held out as humane alternatives, if they subject the condemned prisoner to the foreseeable likelihood of unnecessary pain or suffering. An isolated "*unforeseeable* accident ... [does not] add an element of cruelty" to an execution.[263] But a foreseeable (or substantial) likelihood of unnecessary pain or suffering does violate the Constitution—even if the suffering is not certain, or even likely, to occur in every instance.[264]

The Supreme Court has never directly addressed the constitutionality of any lethal injection protocol, although it has acknowledged that lethal injection is subject to Eighth Amendment requirements.[265] Lower federal courts and state courts have continually rejected prisoners' claims that their state's particular lethal injection methods were cruel and unusual. Some courts concluded there was insufficient evidence of pain and suffering, or that a particular procedure's risks were too slight to strike down lethal injection choices made by state legislatures and their correctional agencies.[266] They reached those decisions without having permitted the prisoners to undertake extensive discovery and without conducting full evidentiary hearings.[267] Other courts avoided ruling on the merits, holding instead that the prisoner did not raise his claims in a timely or proper manner.[268] Courts have rarely examined the development or justification for

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[261] E.g., *Fierro v. Gamble*, 77 F.3d 301, 303 n.1 (Ninth Circuit 1996), vacated on other grounds, 519 U.S. 918 (1996) (noting in challenge to the constitutionality of execution by lethal gas, that California Supreme Court had last considered such a challenge in 1953, and that the court's consideration had been limited by then-existing scientific knowledge).

[262] *Jackson v. Bishop*, 404 F.2d 571,579 (Eighth Circuit 1968).

[263] *Resweber,* 329 U.S. at 464 (emphasis added).

[264] *Campbell v. Wood*, 18 F.3d 662, 687 (Ninth Circuit 1994) (*en banc*) (risk associated with challenged method of execution must be more than slight).

[265] *Nelson v. Campbell,* 541 U.S. 637 (2004).

[266] *Hill v. Florida*, No. SC06-2, 2006, Florida Lexis 8 (Florida, January 17, 2006).

[267] Brief of Appellant-Plaintiff, *Taylor v. Crawford, et al.*, No. 06-1397, February 24, 2006, p. 33-34. See also Defendant Crawford's Answers to Plaintiff's First Interrogatory, *Taylor v. Crawford*, Case No. 05-4173-CV-C-SOW, September 12, 2005, p. 14-15.

[268] E.g., *Gomez v. U.S. District Court for Northern District Of California*, 503 U.S. 653, 654 (1992) (holding that particularly where an inmate has engaged in "abusive delay," the court may consider the state's interest in moving forward with the execution in balancing the inequities); *LaGrand v. Stewart*, 170 F.3d 1158, 1159 (Ninth Circuit 1999) (stating that petitioner's challenge to execution method had previously been dismissed as premature because the method of execution had not yet been chosen); *Beardslee*, 395 F.3d at 1066-67 (stating

the challenged protocols, nor have they explored whether a different lethal injection protocol might carry less risk than the ones currently maintained by the states.

We know of only one case in which a court rejected a Department of Corrections method for changing its protocols. A judge, on administrative grounds, struck down New Jersey's Department of Corrections' proposed amendments to its lethal injection regulations, including the removal of an emergency cart from the execution setting.[269] Under administrative law, a challenged regulation will stand if the state agency can show it meets a relatively low standard of rationality. Yet the court held that the new regulation about the emergency cart, which the New Jersey Department of Corrections justified as unnecessary because the irreversible nature of lethal injections made it impossible to revive a condemned inmate, lacked "an expressed reasoned medical opinion."[270] That is, the Department of Corrections had not come up with evidence that showed a sound basis for its decision. The court remanded the issue to the Department of Corrections to give it an opportunity to articulate "a supporting basis for [its regulations]."[271]

Under U.S. constitutional jurisprudence, the burden is on the prisoner to prove a method of lethal injection is cruel and unusual; public officials do not have to prove they have chosen the best possible method. Prisoners have been hampered in their efforts to challenge their state's lethal injection execution protocols by the difficulty of obtaining documentation on how corrections officials developed their protocols and what happened during earlier executions. As noted above, some courts did not permit the prisoners to undertake much discovery. But in addition, states typically do not document their executions, e.g., keep records of the qualifications of the executioners or logs indicating the time at which the drugs were administered, whether there were any problems with the IV insertion or administration of the drugs, the monitoring of prisoners' vital signs, etc. In other cases, even if prison officials did create such records, they were not retained over the years. Some states have simply refused to provide records that go back in time. They have even made it difficult for prisoners to simply obtain complete copies of the protocols themselves.[272]

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that the fact that Beardslee waited until his execution was imminent, filing suit one month before his execution date, after it was already scheduled, weighed against him).

[269] In re Readoption with Amendments of Death Penalty Regulations by the New Jersey Department of Corrections, 367 New Jersey Sup. 61 (2004).

[270] Ibid., p. 69.

[271] Ibid., p. 71.

[272] Ibid.

Nevertheless, over the years, persistent lawyers have succeeded in obtaining an increasingly powerful set of evidence about problems with state lethal injection procedures. The impact of that evidence is apparent in the February 2006 decision by a federal district court regarding California's lethal injection protocol (See Chapter Five).

For more than two decades, U.S. courts have been notably and increasingly hostile to challenges to the fairness of capital trials and sentences brought by prisoners sentenced to death. When prisoners began bringing cases challenging methods of execution, including the most recent challenges to lethal injection, the courts responded with what may best be characterized as judicial impatience and irritation. In the absence of guidance from the U.S. Supreme Court, lower courts saw the cases as simply another stalling tactic by death row prisoners and failed to give serious consideration to their claims.

The Supreme Court has now agreed to decide the case of *Hill v. McDonough*. The precise question the court will address in *Hill* is whether a prisoner may bring an Eighth Amendment challenge to Florida's lethal injection protocols by seeking declaratory and injunctive relief under 42 United States Code, Section 1983, the civil rights statute that enables plaintiffs to challenge the constitutionality of state actions in federal court.[273] The lower courts held that a challenge to the lethal injection protocol was a challenge to the sentence—which is a habeas case. They therefore concluded condemned prisoner Clarence Hill was not entitled to an evidentiary hearing or injunction, because the case he brought as a Section 1983 case should have been brought as a habeas petition. Moreover, even if it had been brought as a habeas case, it would nonetheless still have been barred under habeas rules unique to the post-conviction review of sentences.[274] Petitioner Hill claims that he is challenging whether a specific lethal injection protocol is cruel and unusual, and he is not challenging the legality or constitutionality of his death sentence as such. Numerous amicus briefs have been filed in the case, urging the Court to recognize the importance of the underlying substantive claim by Hill and to ensure he is given a full opportunity to develop the evidentiary basis for it. Human Rights Watch has joined in an amicus brief bringing to the Court's attention the international human rights requirement that states must choose a method of execution that inflicts the "least possible pain and suffering."[275]

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[273] Petitioner's Brief, *Hill v. McDonough, et al.*, March 6, 2006, p. 2-3.

[274] Ibid., p. 4-11.

[275] Brief amici curiae of Human Rights Advocates, Human Rights Watch, and Minnesota Advocates for Human Rights in Support of Petitioner, *Hill v. McDonough*, No. 05-8794, March 3, 2006, http://hrw.org/us/us030706.pdf (retrieved April 16, 2006).

Although the Hill case is ostensibly about the correct procedure by which a prisoner may challenge his method of execution, its significance may be far greater. The fact that the Supreme Court took the case signals the impact of the growing number of cases pressing federal and state courts to address challenges to lethal injection protocols.[276] As evidence of problems mount, and as the background and development of lethal injection protocols is subjected to greater scrutiny, we hope that courts will be increasingly responsive to prisoners' constitutional challenges.

[276] As of April 1, 2006, there were eight death row inmates (including Morales and Hill) who had been granted stays of execution pending resolution of their challenges to lethal injection protocols. These stays included: Clarence Hill, Florida, by the U.S. Supreme Court; Arthur Rutherford, Florida, by the U.S. Supreme Court; Michael Taylor, Missouri, by the U.S. Supreme Court; Vernon Evans, Maryland, by the Maryland Court of Appeals; Michael Morales, California, by the State of California; Richard Tipton, Cory Johnson, and James Roane, Federal, District Court for District of Columbia. DPIC, "Lethal Injections: Some Cases Stayed, Other Executions Proceed," http://www.deathpenaltyinfo.org/article.php?did=1686&scid=64 (retrieved on April 16, 2006). Ten other inmates did not receive stays and were executed by lethal injection. These were: Marion Dudley, executed in Texas on January 25, 2006; Marvin Bieglher, executed in Indiana on January 27, 2006; Jamie Elizalde, executed in Texas on January 31, 2006; Glenn Benner, executed in Ohio on February 7, 2006 (Benner did not raise a lethal injection claim); Robert Nelville, executed in Texas on February 8, 2006; Clyde Smith, executed in Texas on February 15, 2006; Tommie Hughes, executed in Texas on March 15, 2006; Patrick Moody, executed in North Carolina on March 17, 2006; Robert Salazar, executed in Texas on March 22, 2006; Kevin Kincy, executed in Texas on March 29, 2006. Ibid.

## Appendix A: State Execution Methods

| State | Lethal Injection | Electro-cution | Gas Chamber | Hanging | Firing Squad |
|---|---|---|---|---|---|
| Alabama | ✓ | ✓ | | | |
| Arizona | ✓ | | ✓ | | |
| Arkansas | ✓ | ✓ | | | |
| California | ✓ | | ✓ | | |
| Colorado | ✓ | | | | |
| Connecticut | ✓ | | | | |
| Delaware | ✓ | | | | |
| Florida | ✓ | ✓ | | | |
| Georgia | ✓ | | | | |
| Idaho | ✓ | | | | ✓ |
| Illinois‡ | ✓ | ✓ | | | |
| Indiana | ✓ | | | | |
| Kansas* | ✓ | | | | |
| Kentucky | ✓ | ✓ | | | |
| Louisiana | ✓ | | | | |
| Maryland | ✓ | | ✓ | | |
| Mississippi | ✓ | | | | |
| Missouri | ✓ | | ✓ | | |
| Montana | ✓ | | | | |
| Nebraska | | ✓ | | | |
| Nevada | ✓ | | | | |
| New Hampshire | ✓ | | | ✓ | |

| State | Lethal Injection | Electro-cution | Gas Chamber | Hanging | Firing Squad |
|---|---|---|---|---|---|
| New Jersey‡ | ✓ | | | | |
| New Mexico | ✓ | | | | |
| New York* | ✓ | | | | |
| North Carolina | ✓ | | | | |
| Ohio | ✓ | | | | |
| Oklahoma | ✓ | ✓ | | | ✓ |
| Oregon | ✓ | | | | |
| Pennsylvania | ✓ | | | | |
| South Carolina | ✓ | ✓ | | | |
| South Dakota | ✓ | ✓ | | | |
| Tennessee | ✓ | ✓ | | | |
| Texas | ✓ | | | | |
| Utah | ✓ | | | | ✓ |
| Virginia | ✓ | ✓ | | | |
| Washington | ✓ | | | ✓ | |
| Wyoming | ✓ | | ✓ | | |

Note: The federal government uses the execution method approved in the state in which the prisoner is being executed.

‡ Both Illinois and New Jersey have declared moratoriums on executions in their states.

* New York's death penalty was declared unconstitutional on June 24, 2004, but the legislature has yet to take action on this. Kansas's death penalty was declared unconstitutional on December 17, 2004; the U.S. Supreme Court has scheduled oral arguments for April 25, 2006 to determine the constitutionality of the Kansas statute.

Source: Death Penalty Information Center, "Methods of Execution," http://www.deathpenaltyinfo.org/article.php?scid=8&did=245 (retrieved April 13, 2006).

## Acknowledgements

This report would not have been possible without the generous help of the medical experts, lawyers, legal scholars, and corrections officials who shared with us resources, knowledge, and time.

Jamie Fellner, director of the U.S. Program at Human Rights Watch, and Sarah Tofte, consultant for the U.S. Program, researched and co-wrote this report.

The report was edited by James Ross, senior legal advisor and Iain Levine, director of programs at Human Rights Watch. Dr. Annie Sparrow, researcher at Human Rights Watch, lent medical expertise to the work. Keramet Reiter, associate for the U.S. program, prepared the report for publication. Human Rights Watch staff Andrea Holley, publications director, and Fitzroy Hepkins, mailroom manager, provided production assistance.

Generous financial assistance for the report was provided by the JEHT Foundation. Support from the Open Society Institute and Peter B. Lewis also made possible our work on lethal injection executions.

# APPENDIX 20

# SENATE BILL REPORT
# SB 5500

As Passed Senate, February 2, 1996

**Title:** An act relating to the method of execution.

**Brief Description:** Clarifying the method of execution to be used in Washington state.

**Sponsors:** Senators Smith, Long and Gaspard; by request of Attorney General.

**Brief History:**

**Committee Activity:** Law & Justice: 2/7/95, 2/15/95 [DP, DNP]; 1/11/96 [DP].

Passed Senate, 3/13/95, 45-3; 2/2/96, 45-3.

**SENATE COMMITTEE ON LAW & JUSTICE**

**Majority Report:** Do pass.

Signed by Senators Smith, Chair; Fairley, Vice Chair; Goings, Hargrove, Haugen, Johnson, Long, McCaslin, Roach and Schow.

**Staff:** Martin Lovinger (786-7443)

**Background:** Under current law, when a defendant is sentenced to be executed, the death penalty is carried out by **hanging**, unless the defendant chooses to be executed by lethal injection. If the defendant refuses to make a choice, the means of execution is **hanging**.

Death penalty cases usually give rise to lengthy appeals. One argument in these appeals is that **hanging** is unconstitutional on the basis that it is cruel and unusual punishment. Recently, this issue resulted in a lengthy delay in one Washington case in which a defendant refused to choose between **hanging** and lethal injection. The issue also is part of the basis for the overturning of the death penalty in another Washington case in which the defendant refused to choose the method of execution. In addition to delaying the execution of defendants sentenced to die, these appeals are very expensive. The cost is paid by taxpayers. It is felt that changing the method of execution will eliminate some of the appeals and some of the delay in carrying out executions.

**Summary of Bill:** The death penalty is carried out by lethal injection, unless the defendant chooses **hanging**.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill closes a loophole that has resulted in huge costs for taxpayers, long delays of executions, and delayed closure for the families of murder victims. The public supports fair death row appeals, not frivolous appeals. **Hanging** is far more susceptible to appeal than lethal injection, because it involves such varying factors as the weight of the defendant, rope size, length of drop, etc. Lethal injection allows finite appeals. **Hanging** allows infinite appeals. Changing the method of execution is not an ex post facto law, because the quantum of punishment does not change. Execution is important for the closure of the issue for the victim's families. The method of execution is not important to the families of the victims. Washington is out there alone in defending **hanging** as the primary form of execution.

**Testimony Against:** None.

**Testified:** Christine Gregoire, Attorney General (pro); Karil S. Klingbeil, relative of murder victim (pro).

# FINAL BILL REPORT
# SB 5500
## C 251 L 96
Synopsis as Enacted

**Brief Description:** Clarifying the method of execution to be used in Washington state.

**Sponsors:** Senators Smith, Long and Gaspard; by request of Attorney General.

**Senate Committee on Law & Justice**
**House Committee on Law & Justice**

**Background:** Under current law, when a defendant is sentenced to be executed, the death penalty is carried out by **hanging**, unless the defendant chooses to be executed by lethal injection. If the defendant refuses to make a choice, the means of execution is **hanging**.

Death penalty cases usually give rise to lengthy appeals. One argument in these appeals is that **hanging** is unconstitutional on the basis that it is cruel and unusual punishment. Recently, this issue resulted in a lengthy delay in one Washington case in which a defendant refused to choose between **hanging** and lethal injection. The issue also is part of the basis for the overturning of the death penalty in another Washington case in which the defendant refused to choose the method of execution. In addition to delaying the execution of defendants sentenced to die, these appeals are very expensive. The cost is paid by taxpayers. It is felt that changing the method of execution will eliminate some of the appeals and delay in carrying out executions.

**Summary:** The death penalty is carried out by lethal injection, unless the defendant chooses **hanging**.

**Votes on Final Passage:**
Senate 45 3
House 92 5

**Effective:** June 6, 1996

CERTIFICATION OF ENROLLMENT

**SENATE BILL 5500**

Chapter 251, Laws of 1996

54th Legislature
1996 Regular Session

EXECUTION METHODS

EFFECTIVE DATE: 6/6/96

Passed by the Senate February 2, 1996
YEAS 45 NAYS 3

JOEL PRITCHARD

**President of the Senate**

Passed by the House March 1, 1996

YEAS 92 NAYS 5

CERTIFICATE

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5500** as passed by the Senate and the House of Representatives on the dates hereon set forth.

CLYDE BALLARD

**Speaker of the**

**House of Representatives**

MARTY BROWN

**Secretary**

Approved March 29, 1996
FILED

March 29, 1996 - 4:32 p.m.

MIKE LOWRY

**Governor of the State of Washington**

**Secretary of State**

**State of Washington**

# SENATE BILL 5500

Passed Legislature - 1996 Regular Session

**State of Washington 54th Legislature 1995 Regular Session**

**By** Senators Smith, Long and Gaspard; by request of Attorney General

Read first time 01/25/95. Referred to Committee on Law & Justice.

AN ACT Relating to the method of execution; amending RCW 10.95.180; and prescribing penalties.

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

**Sec. 1.** RCW 10.95.180 and 1986 c 194 s 1 are each amended to read as follows:

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted ((~~either by hanging by the neck or, at the election of the defendant,~~)) by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by **hanging** by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. **Sec. 2.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the Senate February 2, 1996.
Passed the House March 1, 1996.
Approved by the Governor March 29, 1996.
Filed in Office of Secretary of State March 29, 1996.

CERTIFICATION OF ENROLLMENT

**SENATE BILL 5500**

54th Legislature
1996 Regular Session

Passed by the Senate February 2, 1996
YEAS 45 NAYS 3

**President of the Senate**

Passed by the House March 1, 1996
YEAS 92 NAYS 5

CERTIFICATE

I, Marty Brown, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5500** as passed by the Senate and the House of Representatives on the dates hereon set forth.

**Speaker of the**
**House of Representatives**

**Secretary**

Approved
FILED

**Governor of the State of Washington**
**Secretary of State**
**State of Washington**

# SENATE BILL 5500

Passed Legislature - 1996 Regular Session

**State of Washington 54th Legislature 1995 Regular Session**

**By** Senators Smith, Long and Gaspard; by request of Attorney General

Read first time 01/25/95. Referred to Committee on Law & Justice.

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(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

NEW SECTION. **Sec. 2.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

**--- END ---**

p. SB 5500.PL

SB 5500.PI, p.

# APPENDIX 21

# HOUSE BILL REPORT
# SB 5500

**As Passed House:**
March 1, 1996

**Title:** An act relating to the method of execution.

**Brief Description:** Clarifying the method of execution to be used in Washington state.

**Sponsors:** Senators Smith, Long and Gaspard; by request of Attorney General.

**Brief History:**
**Committee Activity:**
Law & Justice: 2/16/96, 2/21/96 [DP].
**Floor Activity:**
Passed House: 3/1/96, 92-5.

**HOUSE COMMITTEE ON LAW & JUSTICE**

**Majority Report:** Do pass. Signed by 14 members: Representatives Sheahan, Chairman; Delvin, Vice Chairman; Hickel, Vice Chairman; Dellwo, Ranking Minority Member; Costa, Assistant Ranking Minority Member; Carrell; Chappell; Cody; Lambert; McMahan; Morris; Robertson; Smith and Sterk.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Murray and Veloria.

**Staff:** Bill Perry (786-7123).

**Background:** **Hanging** is the default method of execution under Washington's death penalty law. The method of execution is **hanging** unless the defendant chooses lethal injection, and only the defendant may choose lethal injection.

The Washington State Supreme Court has held that the death penalty law does not violate constitutional prohibitions against cruel or unusual punishments. However, a federal district court has held that, at least with respect to a defendant weighing in excess of 400 pounds, execution by **hanging** is unconstitutionally cruel.

Over the past several decades, many states have changed the method of execution to be used in their death penalty cases. The United States Supreme Court has held that such changes do not violate constitutional restrictions on the retroactive application of laws. That is, it is permissible for a state to provide for a new method of execution and have it apply even to defendants who have already been sentenced to death by a different method.

**Summary of Bill:** Lethal injection replaces **hanging** as the default method of execution. The method of execution is lethal injection unless the defendant chooses **hanging**, and only the defendant may choose **hanging**.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill will reduce delays and allow carrying out of established public policy. The bill is constitutional and will reduce the number of appeals and the associated cost to the public.

**Testimony Against:** None.

**Testified:** Kathleen Mix, Office of the Attorney General (pro).

# APPENDIX 22

**AFFIDAVIT OF DAVID C. BALDUS**

David C. Baldus, being duly sworn, does hereby depose and say:

1. My name is David C. Baldus and I am the Joseph B. Tyle Professor at the University of Iowa College of Law in Iowa City, Iowa. A copy of my resume is attached to this Affidavit.

2. I have studied statistical methods of measuring discrimination for over thirty years. I am the author of STATISTICAL PROOF OF DISCRIMINATION (1980) (with James Cole) and EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (with George Woodworth and Charles A. Pulaski Jr.) I have authored numerous research papers on the topic of comparative analysis in death penalty sentencing, including *Quantitative Methods for Judging the Comparative Excessiveness of Death Sentences* in THE USE/NONUSE/MISUSES OF APPLIED SOCIAL SCIENCE RESEARCH IN THE COURT: CONFERENCE PROCEEDINGS, 83-94 (M. Saks & C. Baron eds. 1980), *Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): the evidence of race disparities and the record of our courts and legislature in addressing the issue*, REPORT TO A.B.A. SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES (7/25/97) (with G. Woodworth), EQUAL JUSTICE AND THE DEATH PENALTY, A LEGAL AND EMPIRICAL ANALYSIS (1990) (with George Woodworth and Charles A. Pulaski, Jr.), and *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience* (1973-1999), 81 NEB. L. REV. 486 (2002) (with George Woodworth, Catherine Grosso and Aaron Christ).

3. I was appointed a Special Master by the New Jersey Supreme Court in 1988 and pursuant to that appointment I developed over three years the Court's factually based system of

proportionality review report and prepared for the Court a proportionality report for one New Jersey death sentenced case. *See State v. Robert Marshall; Report to the New Jersey Supreme Court (September 24, 1991)* and *Proportionality Review of Death Sentences: The View of the Special Master*, 5 CHANCE 18-27 (Summer 1993) (with G. Woodworth).

4. I have reviewed the database associated with Professor Timothy Kaufman-Osborn's 2004 article, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775 (2004). This database is comprised of "all 259 trial judge reports filed with the Washington State Supreme Court, beginning with those first submitted in response to adoption of the 1981 capital punishment statute and running through March 2003." *Id.* at 815. Under the 1981 statute, Washington trial judges are required to submit reports "in all cases in which a person is convicted of aggravated first-degree murder." *Id.* at 812 (*citing* ch. 138 § 12, 1981 Wash. Law, 535, 541-43).

5. ***Race of Victim Analysis.*** For the purpose of this analysis, I have included every case in the database for which the race of the victim and sentencing outcome is available[1], a total of 251 cases. I divided these cases into two categories: cases in which at least one of the victims was white, and cases in which none of the victims was white. I found that there were a total of 199 cases with at least one white victim (191 cases with all white victims and 8 cases with multiple victims, at least one of whom was white) and that there were 52 cases with non-white victims (2 cases with Black and Hispanic victims, 14 cases with Black victims, 24 cases with Asian victims, 1 case with an American Indian victim, 9 cases with Hispanic victims, and 2 cases

[1] Missing information in the data is discussed in Professor Kaufman-Osborn's article. *Id.* at 815-834.

with Indian[2] victims). I present the results of the race-of-victim analysis in Tables 1 and 2 and paragraphs 6 and 7 below.

**Table 1. Race-of-Victim Disparity in the Rates that Prosecutors Sought the Death Penalty in First-Degree Aggravated Murder Cases - Washington State (1981-2003)**

| | | A | B |
|---|---|---|---|
| | | First-Degree Aggravated Murder Cases (N) | Rates at Which the Prosecution Sought the Death Penalty |
| 1. | All Cases | 251 | 31% (79/251) |
| 2. | Cases with ≥ 1 White Victims | 199 | 36 % (72/199) |
| 3. | Cases with no White Victims | 52 | 13% (7/52) |
| 4. | Difference in Seek Rates (Row 2-Row 3) | | 23-pts. (36% - 13%) |
| 5. | Ratio of Seek Rates (Row 2/Row 3) | | 2.8 (36%/13%) |

6. ***White-Victim Disparity in the Rates at Which the Death Penalty Was Sought.***

Table 1 indicates that the prosecution sought the death penalty at a much higher rate in cases with at least one white victim (36%) (Column B, Row 2) than it did in cases with no white victims (13%) (Column B, Row 3). This white-victim disparity is expressed in two ways in Table 1. Column B, Row 4 documents a 23-percentage point disparity in the seek rates, while Column B, Row 5 indicates that the prosecution sought the death penalty in white victim cases 2.8 times more frequently than it did in non-white victim cases. Both of these disparities are

[2] It is not possible to determine from the database whether these two cases involved Asian or American Indian victims so have been classified independently of both of those categories.

statistically significant beyond the .01 level. In other words, it is very unlikely that these disparities are a product of chance.

**Table 2. Race-of-Victim Disparity in the Rates that Death Sentences Were Imposed In First- Degree Aggravated Murder Cases in Washington State (1981-2003)**

| | | A | B |
|---|---|---|---|
| | | First-Degree Aggravated Murder Cases (N) | Rates at Which Death Sentences Were Imposed |
| 1. | All Cases | 251 | 13% (33/251) |
| 2. | Cases with ≥ 1 White Victims | 199 | 15% (29/199) |
| 3. | Cases with no White Victims | 52 | 8% (4/52) |
| 4. | Difference in Death Sentencing Rates (Row 2 – Row 3) | | 7-pts. (15% - 8%) |
| 5. | Ratio of Death Sentencing Rates (Row 2/Row 3) | | 1.9 (15%/8%) |

7. ***White-Victim Disparity in the Rates that Death Sentences Were Imposed.***

Table 2 (Column B, Rows 2 and 3) reports that the death penalty was imposed in 15% of cases with one or more white victim and in 8% of the cases with no white victim. Column B, Row 4 documents a 7-percentage point white-victim disparity in death sentencing rates, while Column B, Row 5 indicates that the death penalty was imposed 1.9 times more often in cases with at least one white victim than it was in all other cases. However, these disparities are not statistically significant beyond the .10 level. This lack of statistical significance is not surprising given the relatively small numbers of death sentences imposed. *See, e.g., Coates v. Johnson & Johnson,*

756 F.2d 524, 541 (7th Cir.1985) ("statistical significance becomes harder to attain as the sample size shrinks"). Despite its lack of statistical significance, this white-victim disparity raises concern about the fairness with which the death penalty has been imposed in Washington.

**Table 3. Status of Defense Counsel Disparity in the Rates that Death Sentences Were Imposed In First-Degree Aggravated Murder Cases - Washington State (1981-2003)**

| | | A | B |
|---|---|---|---|
| | | First-Degree Aggravated Murder Cases (N) | Rates at Which Death Sentences Were Imposed |
| 1. | All Cases | 254 | 13% (33/254) |
| 2. | Cases with ≥ 1 Appointed Counsel | 239 | 14% (33/239) |
| 3. | Cases with Retained Counsel | 15 | 0% (0/15) |
| 4. | Difference in Death Sentencing Rates (Row 2-Row 3) | | 14-pts. (14% - 0%) |
| 5. | Ratio of Death Sentencing Rates (Row 2/Row 3) | | Indefinite large - (14%/0%) |

8. ***Appointed Versus Retained Counsel Disparity in Death Sentencing Rates.***

Table 3 reports a disparity in death sentencing rates based on the status of defense counsel, i.e., whether counsel was retained or appointed. Of the 259 cases in the database, 254 had information about both the sentence and appointment of counsel.[3] All but 15 of those cases had at least one appointed counsel. In *all* of the 15 cases with only retained counsel, the defendant

[3] One case resulted in suicide before sentencing, one case had no sentencing information, and three cases did not have decipherable information about appointed or retained counsel.

was sentenced to life without possibility of parole. In other words, all of the death sentences were imposed in cases with appointed counsel. Column B, Rows 4 and 5 document 14-percentage points status of counsel disparity in death sentencing rates and an indefinitely large ratio of those rates. However, because of the small samples involved, these disparities are not statistically significant beyond the .10 level. Nevertheless the "inexorable zero" in the death sentencing rate in cases with retained counsel raises concerns about the competence of appointed counsel and/or the risk of discrimination in the system based on the socioeconomic status of the defendant.

9. Although this database of available cases provides useful information about disparities in death sentencing in Washington, additional time and funding would be required to support a thorough review of the type conducted by the New Jersey Supreme Court.

Further, Affiant says not.

David C. Baldus

DAVID C. BALDUS

Sworn to and subscribed before me
this 31st day of October, 2008.

Grace Tully

NOTARY PUBLIC

My Commission Expires: 27 October 2011

NOTARIAL SEAL IOWA
GRACE TULLY
COMMISSION NO. 225295
MY COMMISSION EXPIRES
27 October 2011

**DAVID C. BALDUS** Curriculum Vitae – 04/02/2008

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## ACADEMIC/PROFESSIONAL EMPLOYMENT

UNIVERSITY OF IOWA COLLEGE OF LAW, IOWA CITY, IOWA
*Joseph B. Tye Professor, 1983 - Present*
*Professor, 1972-83*
*Associate Professor, 1969-71*
Subjects: Criminal Law, Anti-discrimination Law, and Capital Punishment\

SYRACUSE UNIVERSITY COLLEGE OF LAW
Center for Interdisciplinary Legal Studies
*Professor and Director, 1981-82*

NATIONAL SCIENCE FOUNDATION
*Director, Law and Social Sciences Program, 1975-76*

NEW JERSEY SUPREME COURT
*Special Master for the Proportionality Review of Death Sentences, 1988-91*

## PRE-ACADEMIC EMPLOYMENT

PENNSYLVANIA CONSTITUTIONAL CONVENTION
*Delegate, 1967-68*

GENERAL PRACTICE OF LAW, Pittsburgh, Pennsylvania
*1964-68*

U.S. ARMY/ARMY SECURITY AGENCY (ASA)
*Lieutenant, 1958-59*

## EDUCATION

YALE LAW SCHOOL
*LL.M., 1969 - LL.B., 1964*

UNIVERSITY OF PITTSBURGH
*M.A., 1962 (Political Science)*

DARTMOUTH COLLEGE
*A.B., 1957 (Government Major)*

## BOOKS AND MONOGRAPHS

Statistical Proof of Discrimination, 386 pages, Shepards-McGraw Hill (1980) (with James W. Cole).

Annual Supplement, Statistical Proof of Discrimination (1981), (1982), (1983), (1984), (1985), (1986), and (1987) (with James W. Cole).

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"Identifying Comparatively Excessive Sentences of Death," 33 Stan. L. Rev. 601-77 (1980) (with C. Pulaski, G. Woodworth, and F. Kyle).

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"Improving Judicial Oversight of Jury Damage Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages," 80 Iowa L. Rev. 1109-1267 (1995) (with J. MacQueen & G. Woodworth).

Keynote Address: "The Death Penalty Dialogue Between Law and Social Science." 70 Ind. U. L. Rev. 1033- 41 (1995).

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"Race Discrimination and the Death Penalty: An Empirical and Legal Overview" (with G. Woodworth) in America's Experiment with Capital Punishment) 385-416 (J. Acker et al, eds. 1st ed.1998); pp. 501-52 in (J. Acker et al. eds. 2nd ed. 2003).

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"Race Discrimination in the Administration Of The Death Penalty: An Overview Of The Empirical Evidence With Special Emphasis On The Post-1990 Research," 39 Crim. L. Bulletin 194-226 (2003) (with G. Woodworth).

"Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 53 De Paul L. Rev. 1411-95 (2004) (with G. Woodworth).

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Work in Progress

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"Equal Justice and the Death Penalty: Some Empirical Evidence," University of Nebraska College of Law, April 10, 1987.

"McCleskey v. Kemp: A methodological critique," Law and Society Association, Washington, D.C., June 12, 1987.

"Law and Statistics in Conflict: Reflections on McCleskey v. Kemp," University of Bristol (March 4, 1988), University of Durham (March 16, 1988), Hebrew University (April 17, 1988), University of Reading (May 6, 1988), University of Oxford (May 27, 1988).

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"The Proportionality Review of Death Sentence: New Jersey's Options," New Jersey Bar Assembly, Headquarters, New Brunswick, New Jersey, April 23, 1992.

"Proportionality Review of Death Sentences: New Jersey's Options," Law and Society Association, Philadelphia, May 24, 1992.

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"Proportionality Review of Death Sentences" & "Race Discrimination in the Use of the Death Penalty," University of Michigan Law School, January 1993.

"Reflections on the Reinstatement of the Death Penalty in Iowa," Public Lecture, Coe College, April 1993.

"Discretion and Disparity in the Administration of the Death Penalty" & "Racial and Ethnic Bias in the Criminal Law: Some Trends and Prospects," AALS Workshop on Criminal Law, Washington, D.C., October 29 & 30, 1993.

"Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for non-pecuniary harms and punitive damages," Conference of Chief Justices, Williamsburg, Virginia, January 1993; Department of Pediatrics, University of Iowa Medical School, February, 1993; Conference on Civil Justice Reform, NYU Law School, October 1993.

"Racial Discrimination in Capital Sentencing: Reflections on its Inevitability and the Impossibility of its Prevention and Cure," Symposium on Racism in the Criminal Law, Washington and Lee Law School, March 11, 1994.

"Racial Discrimination in Mortgage Lending," Department of Housing and Urban Development, January 19, 1994.

"The Death Penalty Dialogue Between Law and Social Science," Keynote Address, Symposium, Capital Jury Project, Indiana Law School, February 24, 1995.

"Reflections on the Failure to Reinstate the Death Penalty in Iowa" & "Claims of Arbitrariness and Discrimination Under State Law; recent trends." Legal Defense Fund Annual Conference on the Death Penalty, Airlie House, Virginia, July 28 & 29, 1995.

"Statistical Approaches to Title VII Discrimination Claims" Defense Lawyers Association, Des Moines, September 1995.

"The Marshall Hypothesis Revisited," University of Pittsburgh Law School, October 1995.

"When Symbols Clash, Reflections of Proportionality Review, Death Sentences," Luncheon speaker, Death Penalty Conference, Seton Hall Law School, Nov. 2, 1995.

"Law As Symbol: explaining the uses of the death penalty in America," DePaul Law School, Chicago, January 1996; Northwestern Law School, March 1996.

"Post-McCleskey Discrimination Claims: Law, Proof and Possibilities," Plenary Session, Legal Defense Fund Annual Conference on the Death Penalty, Georgetown University, July 26, 1996.

"Preliminary Finding from the Pennsylvania Capital Charging and Sentencing Study" and "Law As Symbol," American Criminology Society, November 1996.

"The Death Penalty and How It Might Affect the Iowa Practitioner," Iowa Bar Association Criminal Law Seminar, Des Moines, March 21, 1997.

"Race Discrimination and the Death Penalty: Recent Findings from Philadelphia" Plenary Session, Legal Defense Fund Annual Conference on the Death Penalty, Airlie House, Virginia, July 1997; Death Penalty Symposium; Cornell Law School March 1998; American Society of Criminology, Washington D.C. November 1998.

"The Death Penalty for Iowa: What Would It Bring," testimony before the Iowa House Judiciary Committee, March 1998.

"Race Discrimination and the Proportionality Review of Death Sentences," Yale Law School, March 1998; St. John's Law School, March 1999.

"The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis," Research Club, University of Iowa, December 17, 1999; Center for Socio-Legal Studies, University of Iowa, January 21, 2000; "Race, Crime, and the Constitution Symposium," University of Pennsylvania Law School, January 29, 2000; Law Dept., Erlangen University, Erlangen, Germany, July 18, 2000.

"Race Discrimination in the Administration of the Death Penalty," Senate Judiciary Committee, Pennsylvania Legislature, Harrisburg, Pa., January 22, 2000; The Governor's Race and the Death Penalty Task Force, Tallahassee, Florida, March 30, 2000.

"Reflections on the Use of Capital Punishment in Europe and the United States," Political Science Dept., Erlangen University, Erlangen, Germany, July 17, 2000.

"Race Discrimination in the Administration of the Death Penalty: Current Concerns and Possible Strategies for Addressing the Issue During a Moratorium on Executions," ABA's Call to Action: A Moratorium on Executions, ABA Conference, Carter Center, Atlanta, Georgia, October 12, 2001.

"Race and Gender Disparities in the Administration of the Death Penalty: Recent Finding From Philadelphia and Legislative and Judicial Strategies to Reduce Race and Gender Effects," Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Philadelphia, Pa. December 6, 2000.

"Race Discrimination in the Administration of the Death Penalty," Death Penalty Symposium, NYU Law School, March 29, 2001.

"Reflections on the Use of the Death Penalty in Europe and the United States," Capital Punishment Symposium, Ohio State Law School, March 31, 2001.

"Arbitrariness and Discrimination in the Administration of the Death Penalty: the Nebraska Experience," Judiciary Committee, Nebraska Legislature, October 18, 2001; University of Nebraska Law School, February 22, 2002.

"Reflections on Comparative Proportionality Review" and "Race Discrimination and the Death Penalty: the post-1990 research," John Jay School of Criminal Justice, New York City, November 11, 2002.

"Proving Systemic Systemic Disparate Treatment in Capital Charging and Sentencing and in the Use of Peremptory Challenge" and "Understanding Equal Justice and the Death Penalty: the Role of Social Science," Yale Law School, New Haven, Conn., April 24, 2003.

"Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," DePaul Law Review Capital Punishment Symposium, Chicago Ill, Oct. 23, 2003.

"Excessiveness and Race Discrimination in the Military Death Penalty: Lessons from Civilian Courts Since *Furman v. Georgia* (1972)," Judicial Conference of the Court of Appeals For The Armed Forces, Columbus School of Law, Washington, D.C. May 19, 2004.

"Questions and Answers Concerning Evidence of Racial Disparities in the Administration of the Death Penalty," CLE Panel, NAACP Convention, Milwaukee, WI, July 11, 2005.

"Race Discrimination and the Administration of the Death Penalty: the experience of the United States Armed Forces: preliminary findings" University of Illinois Law School Seminar, April 15, 2006 and Harvard Law School conference on Race and the Death Penalty, May 5, 2006.

"Racial Discrimination in the Administration of the Death Penalty: the Maryland experience (1978-2000),"Maryland Summit on the Abolition of Capital Punishment, Baltimore Md., January 2007.

"Race and Proportionality since *McCleskey v. Kemp* (1987): different actors with mixed strategies of denial and avoidance," Columbia Law School and NAACP Symposium "Pursing Racial Fairness in the Administration of Justice: Twenty Years After *Mc McCleskey v. Kemp,* March 3, 2007; University of Miami Law School, Seminar, March 19, 2007; Georgia State University Law School, Atlanta, Conference on Race Discrimination and the Administration of the Criminal Justice System, October 4, 2007.

"The Story of *McCleskey v. Kemp*: Capital Punishment and the Legitimization of Racial Discrimination," University of Texas Law School, Symposium on Capital Punishment Stories, Foundation Press (200), November 4, 2007)

"Evidence of the Inevitability and Ineradicability of Arbitrariness and Discrimination in the Administration of Capital Punishment in Maryland – Past, Present and Future," Testimony before the Maryland Capital Punishment Commission, Annapolis, Maryland, July 30, 2008.

## Miscellaneous

Member: American Bar Association; American Law Institute; American Society of Criminology; Law and Society Association.

Board of Editors: Evaluation Quarterly (1976-79); Law & Policy Quarterly (1978-79); Law and Human Behavior (1984- ); Psychology, Public Policy and Law (1994- ).

Board of Trustees, Law and Society Association (1992-94).

Grant Recipient, N.S.F. Law and Social Science Program
1974-75--"Quantitative Proof of Discrimination."

Invited Participant, N.S.F. Sponsored Conference on the Use of Scientific Evidence in Judicial Proceedings, November 1977.

Invited Participant, ABA--AAAS Conference on Cross Education of Lawyers and Scientists, Airlie House, Virginia, May 1978.

Reporter, Roscoe Pound Am. Tr. Lawyers Foundation Conf. On Capital Punishment, Harvard University, June 1980.

Grant Recipient, National Institute of Justice, 1980-81, "The Impact of Procedural Reform on Capital Sentencing: the Georgia Experience."

Consultant, Delaware Supreme Court, April 1981 and South Dakota Supreme Court, November 1981, on the proportionality review of death sentences.

Member, Special Committee of the Association of the Bar of New York on Empirical Data in Legal Decision Making and the Judicial Management of Large Data Sets (1980-82).

Grant Recipient, NSF Law & Social Science Program. "A Longitudinal Study of Homicide Case Processing" (1983).

Consultant, National Center for State Courts project on the proportionality review of death sentences (1982-84).

Expert witness in McCleskey v. Kemp, 105 S.Ct. 1756 (1987), a capital case challenging the constitutionality of Georgia's capital sentence process.

Recipient, Law and Society Association's Harry Kalven Prize for Distinguished Scholarship in Law and Society (with G. Woodworth & C. Pulaski) for our capital punishment research ( June 11, 1987).

Grant recipient, State Justice Institute, 1988-1992, "Judicial Management of Judicial Awards for Noneconomic and Punitive Damages" (with Dr. J. MacQueen & J. Gittler).

Special Master for Proportionality Review of Death Sentences for the New Jersey Supreme Court: 1988-91.

Member, AALS Committee on Curriculum and Research (1994-97).

Recipient, "Michael J. Brody Award for Faculty Excellence in Service to the University of Iowa", October 1996.

Recipient, "Award For Faculty Excellence," Board of Regents, State of Iowa, October 18, 2000.

Grant recipient, Nebraska Crime Commission, "The Disposition of Nebraska Homicide Cases (1973-1999)" (2000).

Grant recipient, JEHT Foundation, support for study of racial discrimination in the death penalty: the experience of the United States Armed Forces: 1984-2005 (October 2005).

Recipient, Harold Hughes Award, Iowans Against the Death Penalty (October 27, 2007) for advocacy and research used in opposition to the reintroduction of the death penalty in Iowa.

Member, AAUP, Iowa Chapter (1969-___), Member, Executive Board (1992- ___), Member Committee A (1985-__)

THE HONORABLE (name of judge)

**IN THE SUPREME COURT FOR THE STATE OF WASHINGTON**

DAROLD R.J. STENSON,

Petitioner-Plaintiff,

v.

ELDON VAIL, Secretary of Washington Department of Corrections (in his official capacity), *et al.*,

Respondents-Defendants.

**No. 83828-3**

**CERTIFICATE OF SERVICE**

I, Nina Jenkins, hereby certify and declare that on the 12th day of February, 2010, I sent a copy of the following documents:

1. Motion of the Amicus Curiae Brief of the American Civil Liberties Union of Washington for leave to file Amicus Brief and Motion of the ACLU-WA to file an Overlength Brief
2. Amicus Curiae Brief of the American Civil Liberties Union of Washington

to the following people, in the manner noted:



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☒ VIA US MAIL
☐ VIA FACSIMILE
☐ VIA E-MAIL
☐ VIA MESSENGER

DATED this 12th day of February, 2010 at Seattle, Washington.

Nina Jenkins
Legal Program Assistant
American Civil Liberties Union of
Washington Foundation



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