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May 13, 2013, 12:42 pm
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notation ruling dated
6/17/2013 and
(Sup. App 00001-
00002)

Supreme Court No. 88522-2

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Plaintiff,

v.

CHRISTOPHER JOHN MONFORT,

Defendant.

SECOND SUPPLEMENTAL APPENDIX TO
CROSS-MOTION FOR DISCRETIONARY REVIEW

By:

SUZANNE LEE ELLIOTT
WSBA 12634
Attorney for Defendant
Law Office of Suzanne Lee Elliott
Suite 1300 Hoge Building
705 Second Avenue
Seattle, WA 98104

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2nd Supp. App. 00001-00002
Stricken by notation ruling
dated 6/17/2013

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 eliminate 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. → *interstitial Q.*

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 capital 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.

T.H.
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 circumstances 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 revision 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 prohibition 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 existence or not of mitigating circumstances. The Texas statute on its face, queried nothing of mitigating circumstances.

Cf. → 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

? "dropped re aggravating
added re mitigating"

the question is not necessary for a constitutional capital punishment statute, it should be forever abandoned. O

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.

cf →

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 afflicted 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 accommodate 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 voluntariness 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 homicide 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 or 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.

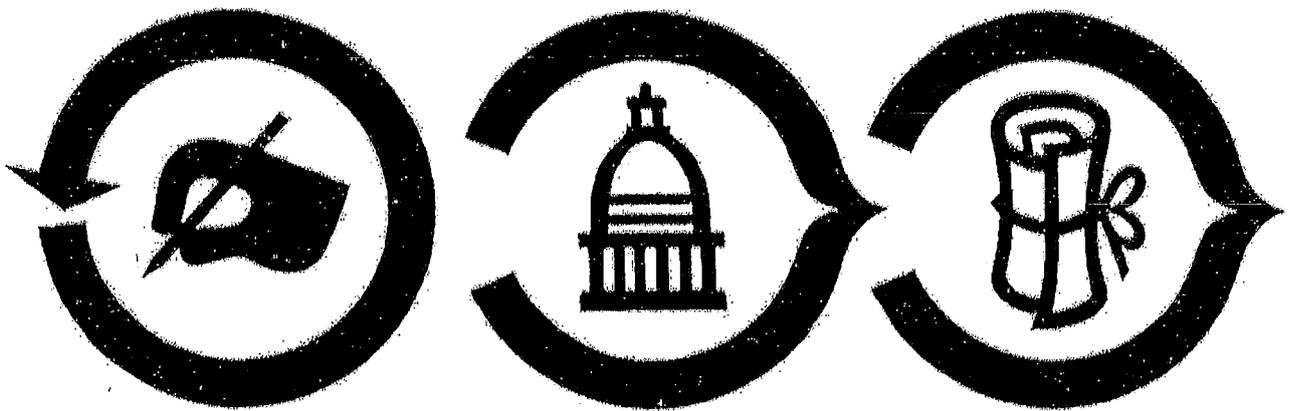
A severability clause is obviously necessary for this act.

PAMPHLET OF CANDIDATES FOR SECRETARY OF STATE ENCLOSED

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Official Voters Pamphlet

PUBLISHED BY OFFICE OF THE SECRETARY OF STATE



General Election Tuesday, November 4, 1975

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Voter's Check List

Every Washington voter will vote on six state measures and on the position of secretary of state at the approaching state general election, Tuesday, November 4, 1975. The ballot titles for the state measures and the statewide ballot for secretary of state are reproduced below as a convenience to the voter in preparing to go to the polls or cast an absentee ballot. Because of the annual state general election law, some legislative positions and some partisan county offices will be voted upon for unexpired terms in different parts of the state. Because of the great variation in local ballots, it is not practical to include a check list for local offices in this pamphlet. However, voters are encouraged to bring any lists or sample ballots to the polling place to make voting easier. State law reads: "Any voter may take with him into the polling place any printed or written memorandum to assist him in marking or preparing his ballot". (RCW 29.51.180)

Proposed by Initiative Petition

INITIATIVE MEASURE No. 314

Shall corporations pay a 12% excise tax measured by income so that special school levies may be reduced or eliminated?

YES

NO

Proposed by Initiative Petition

INITIATIVE MEASURE No. 316

Shall the death penalty be mandatory in the case of aggravated murder in the first degree?

YES

NO

Proposed to the People by the Legislature

REFERENDUM BILL No. 35

Shall the Governor, in filling U.S. Senate vacancies, be limited to the same political party as the former incumbent?

YES

NO

Amendment to the State Constitution
Proposed by the Legislature

SENATE JOINT RESOLUTION No. 101

Shall the existing constitutional provisions relating to the judiciary be replaced by a new and revised judicial article?

YES

NO

Amendment to the State Constitution
Proposed by the Legislature

SENATE JOINT RESOLUTION No. 127

Shall a commission be created to fix all legislative salaries and legislators' eligibility for election to other offices be expanded?

YES

NO

Amendment to the State Constitution
Proposed by the Legislature

HOUSE JOINT RESOLUTION No. 19

Shall Washington's constitution be amended to permit governmental assistance for students of all educational institutions—limited by the federal constitution?

YES

NO

SECRETARY OF STATE — One Year Unexpired Term—Vote for One

Republican Party	Democratic Party
BRUCE K. CHAPMAN <input type="checkbox"/>	KAY D. ANDERSON <input type="checkbox"/>
..... <input type="checkbox"/> <input type="checkbox"/>

CUT THIS PAGE OUT AND TAKE TO YOUR POLLING PLACE



A60004 707145

Introduction to the Official Voters' Pamphlet

Six state measures have been referred to the voters for their approval or rejection at the November 4, 1975, state general election. As required by law, a publication containing the official ballot titles, attorney general's explanations, statements for and against, and rebuttal statements, together with the full text of each of the state measures, must be mailed to each place of residence in the state by the secretary of state prior to the general election. The official ballot titles and explanatory statements have been prepared by the attorney general. The statements for and against and the rebuttal statements have been prepared by committees appointed under a procedure established by law. The secretary of state has no authority to evaluate the truth or accuracy of any of the statements made in the pamphlet or to alter their content in any way.

The text of the constitutional amendments which will appear on the ballot this fall are presented in a new format this year. Each of the amendments repeals or otherwise modifies the effect of existing constitutional provisions. These repealed or affected provisions are presented in the left-hand column of each text page and the proposed constitutional amendments are presented in the right-hand column of the page. In this manner, voters can directly compare the existing provisions with the proposed amendments. We hope this new format will make it easier for the voters to understand these complex measures. A candidates' pamphlet, containing the statements of the candidates nominated for the position of secretary of state is found on page 30.

As Secretary of State of the State of Washington, I hereby certify that I have caused the text of each proposed measure, ballot title, explanatory statement, statement for and against, and rebuttal statement which appears in this publication to be compared with the original of such documents on file in my office and I find them to be full, true, and correct copies of such originals. Witness my hand and the seal of the state of Washington this first day of October, 1975.



Bruce K. Chapman

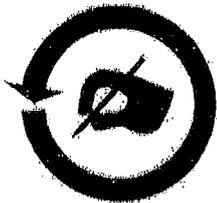
BRUCE K. CHAPMAN
Secretary of State

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Toll-Free Telephone Voters' Service

Again this year, the office of the Secretary of State will provide a toll-free telephone line for election information. Voters from any part of the state may call the toll-free number to receive background information on the statewide ballot measures, information on absentee voting, or other assistance in connection with the state general election. The toll-free number is 1-800-562-6020. The information service will be in operation Monday through Friday from 12 p.m. to 8 p.m. through November 4. It will also be open on Saturday, November 1 from 9 a.m. to 5 p.m. and on Wednesday, November 5 from 9 a.m. to 5 p.m. We encourage Washington voters to take advantage of this service.



Initiative Measure 314

TO THE PEOPLE

Ballot Title:

Shall corporations pay a 12% excise tax measured by income so that special school levies may be reduced or eliminated?

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Initiative Measure 314 begins on Page 16.

Statement for

When the Legislature failed to reduce consumer taxes and solve the school funding crisis, more than 122,000 Washington voters signed Initiative 314.

YOU NOW PAY MORE THAN YOUR FAIR SHARE

Individual taxes are too high; corporate taxes are too low. Sales taxes have been increased four times in sixteen years. Property taxes have nearly tripled. State tax loopholes benefit the large corporations. Initiative 314 gives individual taxpayers a long overdue break.

INITIATIVE 314 CUTS PROPERTY TAXES

Initiative 314 shifts the tax load from Washington property owners, including Washington-based businesses. Property taxes will be reduced by \$195 million a year. The tax on corporate profits will be paid only by those who can afford it — mainly large, out-of-state corporations which pay minimal property taxes and employ few people in the state. The state's 100,000 unincorporated small businesses will be exempt.

INITIATIVE 314 RELIEVES THE SCHOOL FUNDING CRISIS

Initiative 314 is the only realistic alternative to special school levies for funding the basic needs of schools. With expected economies in school spending, it will replace most of special levies. Special levies can then be used for special purposes. Schools will remain under local control. Failure of 314 will only worsen the school funding problem.

INITIATIVE 314 STIMULATES BUSINESS AND CREATES JOBS

Initiative 314 keeps more than \$100 million in the state that would otherwise go to out-of-state stockholders as corporate

dividends or to the federal government as taxes. This money can be spent by consumers to stimulate business and create jobs for Washington's 150,000 unemployed workers. Corporate business continues to grow and prosper in the 45 other states which already tax corporate profits.

Rebuttal of Statement against

The big business opponents have cleverly tried to cloud this issue. Their goal is to confuse and frighten voters with statements that cannot be substantiated. Their allegations have been proven incorrect in the 45 other states with a corporate tax. Remember, when the clouds are cleared, 314 does four things: (1) Substantially reduces property taxes; (2) Shifts our tax burden by taxing corporate profits only; (3) Helps solve the school funding crisis; (4) Stimulates our economy and creates jobs.

Voters' Pamphlet Statement Prepared by:

NAT WASHINGTON, State Senator, Democrat; CHARLES MOON, State Representative, Democrat; and JOE HAUSLER, State Representative, Democrat.

Advisory Committee: Dr. REED HANSON, Department of Economics, Washington State University; JAMES AUCUTT, President, Washington Education Association; JOE DAVIS, President, Washington State Labor Council, AFL-CIO; MAXINE KRULL, President, League of Women Voters of Washington; and TOM HALL, President, Washington State Dairy Federation.

The Law as it now exists:

The state does not now impose any tax measured by net income or profits on corporations or any other taxpayers. Corporations, and other types of businesses, however, now pay various excise and property taxes, together with license fees. The main excise tax is the business and occupation tax, which is measured by gross income (total business volume) and which is imposed at various rates of not more than 1%. There is no restriction on the purposes for which the moneys derived from the business and occupation tax may be expended.

The effect of Initiative 314, if approved into Law:

This Initiative, if upheld by the courts, would impose upon corporations a 12% tax measured by net income or profits derived from their business in this state. Revenue received from the tax would be earmarked for school support. The annual license fees which are currently paid by corporations would be allowed as credits against the new tax. The business and occupation tax and other excise and property taxes, however, would not be allowed as such credits.

Statement against

MASSIVE TAX INCREASE—AND STILL NO ANSWER FOR SCHOOLS

Initiative 314 would raise only about half the money needed to replace special levies—special levies would still be necessary. Passage would considerably delay a workable solution for schools as the Initiative is certain to be challenged on its constitutionality—the Legislature will be reluctant to act until the courts decide. Passage would add additional problems of more control from Olympia and less decision making by local citizens.

DOUBLE TAXATION—A TAX ON PEOPLE

Corporate business already pays the state business and occupations tax the same as all other business. Only a fraction of the 40,000 corporations doing business in Washington are based out-of-state—all the rest are Washington citizens doing business in Washington. Washington owned and operated business would have no other alternatives than to raise prices or lay off workers—those faced with out-of-state competition may be forced out of business.

MORE STATE SPENDING—NOT LESS TAXES FOR PEOPLE

Initiative 314 adds a new tax and more money for schools without controls for prudent spending and local school accountability. It creates another costly state bureaucracy to administer and collect the tax. It does not roll-back already voted school levies for taxes in 1976. There is no provision to

require landlords to pass any tax relief on to renters. It says nothing about limiting or eliminating special levies—levies will still be necessary and will grow as in the past.

A BUSINESS INCOME TAX—DOORWAY TO UNLIMITED PERSONAL INCOME TAXES

Initiative 314 is a net income tax on business. If held constitutional by the courts, the door is open for an income tax on individual salaries and wages.

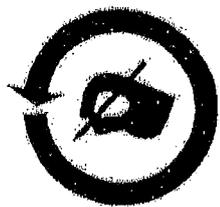
Rebuttal of Statement for

DON'T BE FOOLED! Substituting one tax for another does not create jobs for unemployed or stimulate business. Double taxation of Washington business to get at a few out-of-state firms hurts Washington citizens. With no exemptions for small businesses, 314 makes Washington's business taxes the nation's highest—you will share that burden in higher costs for food, clothing, utilities, and other basics. **DON'T BE MISLED!** 314 does not guarantee tax relief or limit special levies!

Voters' Pamphlet Statement Prepared by:

HUBERT E. DONOHUE, State Senator, Democrat; and IRVING NEWHOUSE, State Representative, Republican.

Advisory Committee: JIM MATSON, State Senator, Republican; WILLIAM S. LECKENBY, State Representative, Republican, Co-Chairman of Committee Against "314"; and DORM BRAMAN, Co-Chairman of Committee Against "314."



Initiative Measure 316

TO THE PEOPLE

Ballot Title:

Shall the death penalty be mandatory in the case of aggravated murder in the first degree?

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Initiative Measure 316 begins on Page 20.

Statement for

PEOPLE ASKED FOR INITIATIVE 316

Initiative 316 is being presented on the ballot because over 120,000 individual voters asked for it by signing initiative petitions. These citizens are understandably concerned about current methods for handling convicted murderers. Under present Washington State law and practice, even the most heinous murderer sentenced to life imprisonment is, at least theoretically, eligible for parole within 13 years and 4 months.

INITIATIVE 316 WOULD REINSTATE LIMITED MANDATORY CAPITAL PUNISHMENT

Initiative 316 amends Washington State law to provide for mandatory capital punishment for certain specific crimes of murder. These would be called "aggravated murder in the first degree" and would include murder for hire; murder committed during rape or kidnapping; and murder of a peace officer who is performing official duties. (See additional crimes specified in complete text of Initiative 316 in back of pamphlet).

CAPITAL PUNISHMENT ACCEPTED BY MOST AMERICANS

Since 1972, 34 states (and the Federal government) have reinstated capital punishment. Opponents say juries would refuse to convict a murderer if that verdict would result in capital punishment. Yet, well over 100 persons in the U.S., in the last three years, have been convicted of crimes which subject them to capital punishment.

SCALES OF JUSTICE NEED RE-BALANCING

Initiative 316 would serve several vital social functions. It would provide a deterrence to the would-be murderer; it would identify those crimes specified in Initiative 316 as particularly outrageous to society; and it would serve to reinforce society's concern for the dignity and value of innocent human life. The victims of heinous murders and their families have been neglected for too long. Help re-balance the scales of justice by voting for Initiative 316 November 4th.

Rebuttal of Statement against

Opposition arguments are an assortment of emotional appeals and misleading statements. Opponents **well know** the U.S. Supreme Court has ruled capital punishment **must be mandatory**. **No study has ever found** that capital punishment **does not** deter heinous murder. It is **just not true** that juries will release persons proven guilty of murders specified in Initiative 316! Murder rates? Here's one: Washington, up 30% in 1974! Convicted killers **do** kill again! Just read the newspapers!

Voters' Pamphlet Statement Prepared by:

AL HENRY, State Senator, Democrat; EARL F. TILLY, State Representative, Republican; and MARGARET HURLEY, State Representative, Democrat.

Advisory Committee; JACK SILVERS, Master, Washington State Grange; ALBERT D. ROSELLINI, Former Governor, Democrat; and PEGGY SJOBLUM, Legislative Liaison, Family and Friends of Missing Persons and Victims of Violent Crimes.

The Law as it now exists:

In accordance with rulings of both the United States and Washington State Supreme Court, the maximum penalty for first degree murder or kidnapping under present law is life imprisonment. These decisions are incorporated in the recently passed revision of the state criminal code, which is to become effective July 1, 1976.

The effect of Initiative 316, if approved into Law:

This initiative, if upheld by the courts, would add to the new state criminal code an additional degree of murder labeled "aggravated murder in the first degree." It would then provide for the mandatory imposition of the death penalty in the case of any conviction of this crime.

Murder in the first degree would constitute aggravated murder in the first degree under any of the following circumstances:

- (1) When the victim is a law enforcement officer or fire fighter performing his official duties;
- (2) When the defendant is serving a term of imprisonment in a state institution at the time of the act resulting in the death;
- (3) When the defendant committed or solicited another person to commit the murder for pay;

(4) When the murder was committed with intent to conceal the commission of another crime or the identity of any person committing that crime, or when the murder was committed with intent to obstruct justice;

(5) When there is more than one victim and the murders result from a single act or were part of a common scheme or plan;

(6) When the defendant committed the murder in furtherance of the crime of rape or kidnapping or in immediate flight from those crimes.

If the death penalty provisions of this initiative are found to be unconstitutional, the initiative substitutes a mandatory sentence of life imprisonment. That sentence cannot be suspended, deferred nor commuted by anyone other than the Governor.

Statement against

Under Washington law, the death penalty "must be inflicted by hanging by the neck." This initiative makes hanging "mandatory"—the only possible penalty upon conviction. Vote against this barbaric practice.

HANGING IS WRONG

Executions degrade and bloody us all. Human life isn't sacred when we kill in the name of the State. Murderers should be locked up, not imitated.

HANGING DOESN'T PREVENT MURDERS

Criminologists have made dozens of studies to determine whether the death penalty reduces the number of murders. Every one of them has found that it does not. States without capital punishment have the lowest murder rates. Last year, the murder rate was higher in almost every state that has the death penalty, than it was in Washington.

"MANDATORY" HANGING PREVENTS CONVICTIONS

Juries often acquit when conviction requires a death sentence. "Mandatory" capital punishment was abolished long ago in every state in the country— including Washington, in 1909 — primarily because guilty men were being set free by juries unwilling to sentence them to die.

HANGING IS UNNECESSARY

It is not true that murderers sent to prison for life get out and kill again. In all Washington's history, no one who could be executed under this initiative has ever been paroled and then committed another murder.

HANGING IS IRREVERSIBLE

Innocent people have been convicted of murder. Some have been executed. There is no way to pardon a man after he is hanged.

HANGING IS EXPENSIVE

Death penalty trials and appeals cost so much that it's cheaper to imprison a man for life than execute him. Our tax dollars could better be spent on police protection and aid to families of murder victims.

Rebuttal of Statement for

Initiative 316's proponents claim that it will show our outrage at certain crimes of murder. All murders are outrageous. Initiative 316 only applies to some. We need real solutions to the real problem posed by all homicides, not ineffective gestures aimed only at a few. Hanging people won't stop crime and won't bring victims back. It certainly won't show our "concern for the dignity" of human life. Vote against this brutal, senseless measure.

Voters' Pamphlet Statement Prepared by:

GARY GRANT, State Senator, Democrat; RICK SMITH, State Representative, Democrat; DANIEL J. EVANS, Governor, Republican.

Advisory Committee: Most Reverend RAYMOND G. HUNTHAUSEN, Archbishop of Seattle; Dr. EDWARD B. LINDAMAN; JOAN MASON, President, Families of Murder Victims Against Revenge; MARIANNE CRAFT NORTON, President, Washington State Division, American Association of University Women; CHARLES Z. SMITH, Associate Dean, University of Washington School of Law.



Referendum Bill 35

Chapter 89, Laws of 1975, 1st ex. sess.

Ballot Title:

Shall the Governor, in filling U.S. Senate vacancies, be limited to the same political party as the former incumbent?

Vote cast by the members of the 1975 Legislature on final passage:
HOUSE [98 members]: Yeas, 56; Nays, 31; Absent or not voting, 11.
SENATE [49 members]: Yeas, 31; Nays, 17; Absent or not voting, 1.

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Referendum Bill 35 begins on Page 20.

Statement for

The Selection of a U. S. Senator Should Not be Made Behind Closed Doors

In 1972 the people of the state of Washington passed Initiative 276, the public disclosure law, putting Washington ahead of every other state in political reform; in 1975, with the passage of Referendum 35, we have the opportunity to lead the nation in a long over-due governmental reform—the selection of appointments to the United States Senate.

Under existing state law, if a U.S. Senate seat becomes vacant the governor may choose anyone he wishes, and it could be a large financial contributor, a relative or even himself. And there is no accountability. Under the proposed measure a governor must choose from a list of three names submitted to him from the duly-elected state central committee of the party of the individual who vacated the senate seat.

Not only does this provide a standard process of selecting appointments, but it also restores a check and balance to the selection process. Moreover, it insures the retention of the basic philosophy of the incumbent. In the last six years governors in New York and Ohio appointed successors of the opposite political party to fill vacated seats—one was a Republican filling a previously Democratic-controlled seat, and one was a Democrat filling a previously Republican-controlled seat—and the voters of the respective states rejected both when they came up for election.

Why is it needed now? Referendum 35 is part of a trend that is apparent on the state and federal level, of decentral-

izing power in the executive branch of government and restoring checks and balances to the governmental process. Moreover, it is of particular importance in the state of Washington from a practical standpoint because both United States Senators from this state are over 60 years of age, and either could be forced to leave office due to illness or death.

Both U.S. Senator Warren Magnuson and U.S. Senator Henry M. Jackson have endorsed Referendum 35.

Rebuttal of Statement against

In their rush to oppose Referendum 35 its opponents have abandoned reason for emotion. Referendum 35 is endorsed by both of our present U.S. Senators, and is supported by Republicans and Democrats alike because it takes the selection of U.S. Senate appointees out of the hands of one man and behind the closed executive office doors, and puts it into the hands of a duly-elected, broad-based, statewide committee, in an open election. The appointment is too important to be left totally to the whim of one person. Referendum 35 is a long overdue governmental reform measure that makes government more accountable to the public that supports it.

Voters' Pamphlet Statement Prepared by:

PETER VON REICHBAUER, State Senator, Democrat; and
ELEANOR FORTSON, State Representative, Democrat.

The Law as it now exists:

When a vacancy occurs in the office of a United States senator, the Governor has the power to appoint a person, without regard to his or her political party affiliation, to fill that vacancy until the next general state election, at which time the people have an opportunity to elect a person to the office. General state elections can be held in either even or odd-numbered years, thus the maximum term for which an appointed United States senator may serve without standing for election is approximately twelve months.

The effect of Referendum Bill 35, if approved into Law:

If approved, Referendum Bill No. 35 would limit the Governor, in filling a United States Senate vacancy, to a list of three names submitted by the State Central Committee of the same political party as the senator who held office prior to the vacancy.

Referendum Bill No. 35 would also specify that elections to fill such vacancies can be held only in even-numbered years, thus increasing the term of an appointed United States senator to a maximum of approximately 27 months.

Statement against

**DON'T LOSE YOUR RIGHT TO VOTE
TO POLITICAL BOSSES.
VOTE "NO" ON REFERENDUM 35.**

When an elected position becomes vacant in Washington state between elections, that position is filled by appointment, but only until the next general election when the people elect a successor. General elections take place every year.

But Referendum 35 would delay the election for as long as 27 months in the case of United States Senators only—one of the most important of all the officials we elect!

Referendum 35 allows unelected political bosses to choose a United States Senator for what can be a very long term; now, the law allows an elected governor to fill a vacancy, but only for a short term until the next general election. Your right to vote is to be given to partisan political leaders.

No state has ever had a procedure such as that proposed by Referendum 35. Why? Because it eliminates the long-standing openness found in the present process, promotes closed-door party politics, and sharply curtails the right of the people to vote.

Referendum 35 narrows the basis for selection, excluding the well-qualified candidates simply because they have the wrong political affiliation or because they are "Independent."

While the governor can be held accountable to all the people of the state for a poor selection, the state central committee of a political party has no such accountability.

Referendum 35 is bad. It deprives the people of control in

order to turn that control over to a handful of political party leaders.

Rebuttal of Statement for

VOTE AGAINST BACKROOM POLITICS! State political committees are chosen by a few political persons who make political decisions and who are accountable to no one. They are not elected by the people. Governors are elected by the people and are accountable to all the people. The supporters of Referendum 35 have given no reason for what might be the most important reason to vote against this proposal—it would delay the election of a United States Senator for as long as 27 months!

Voters' Pamphlet Statement Prepared by:

GEORGE SCOTT, State Senator, Republican; and IRVING NEWHOUSE, State Representative, Republican.



Senate Joint Resolution 101

Proposed Constitutional Amendment

Ballot Title:

Shall the existing constitutional provisions relating to the judiciary be replaced by a new and revised judicial article?

Vote cast by the members of the 1975 Legislature on final passage:
HOUSE [88 members]: Yeas, 84; Nays, 2; Absent or not voting, 12.
SENATE [49 members]: Yeas, 45; Nays, 1; Absent or not voting, 3.

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Senate Joint Resolution 101 begins on Page 21.

Statement for

MODERNIZATION OF OUR COURT SYSTEM

Our present judicial article was largely written in 1889 and is primarily designed to deal with the kind and amount of litigation that existed in 1889. Times have drastically changed. SJR 101 will modernize our judicial article and provide us with better tools to deal with contemporary problems.

FOR YOUR BEST INTERESTS

SJR 101 will result in our courts being operated in a more efficient business-like manner. It is supported by and in part results from the recommendations of the blue ribbon Citizens Committee on Washington Courts.

MAJOR IMPROVEMENTS WHICH WOULD BE MADE BY SJR 101

SJR 101 would make the following major improvements:

- (1) *Coordinated administration of all courts in the state.* You may have experienced some of the frustration and delay which has led thousands of people to decide that such coordination is badly needed. Passage of SJR 101 will enable Washington to have a true statewide system of courts for the first time.
- (2) *Judicial Qualifications Commission for the discipline and removal of errant, inefficient, or arbitrary judges.* The Commission members will be three (3) judges, two (2) lawyers, and four (4) nonlawyer members of the general public.

- (3) *Upgrading of district courts.* The quality of district courts will be upgraded by (a) requiring that eventually all of the judges be qualified as attorneys, (b) giving constitutional status to district courts, (c) providing for flexibility and coordination in such matters as sharing of workload and uniformity of procedures, and (d) allowing district courts to become courts of record by later legislative enactment.

Rebuttal of Statement against

SJR 101 removes no constitutional protections for taxpayers. Our basic protection against unwanted changes in the state constitution is the fact that all such changes must be submitted to a vote of the people. Nothing in SJR 101 changes that. There will be only one change, and that is to reform our judicial system. Other arguments against SJR 101 are deceptive. Merit selection is "prohibited" only in that the people will keep the right to vote for judges.

Voters' Pamphlet Statement Prepared by:

PETE FRANCIS, State Senator, Democrat; and ED SEEBERGER, State Representative, Democrat.

Advisory Committee: KEN BILLINGTON, Chairman, Citizens' Committee on the Courts; MAXINE KRULL; JOHN McCLELLAND, JR.; IRVINE RABEL, Co-Director, Citizens for Court Reform — SJR 101; and WILFRED WOODS, Co-Director, Citizens for Court Reform — SJR 101.

The Law as it now exists:

The judicial branch of state government is established and governed by Article IV of the Washington State Constitution, as amended.

The state courts established by Article IV of the Constitution, in descending order of authority, are the State Supreme Court, the Court of Appeals, and the Superior Courts. Additionally, other inferior courts are created by statute, such as the various district and municipal courts.

The State Supreme Court has original jurisdiction in *habeas corpus*, *quò warrantò*, and *mandamus* as to state officers. It also has the authority to review decisions of lower courts, except in some civil actions when the money or property involved is worth less than \$200. Although the Court of Appeals is created by the Constitution, its jurisdiction is defined by statute and court rule. The Superior Courts have original jurisdiction of controversies in excess of \$1,000, probate, divorce, real property, validity of taxes, felony crimes, and all matters not exclusively vested in another court.

When a vacancy occurs on the Supreme Court, Court of Appeals or the Superior Courts, the Governor fills such vacancy by appointment, and the person so appointed holds office until the next regular election.

Justices of the Supreme Court, and Judges of the Court of Appeals and the Superior Courts can only be removed from office by a joint resolution of the legislature for cause concurred in by three-fourths of the members.

The Chief Justice of the State Supreme Court is selected by the members of the court for a two-year term from among those justices who have the shortest remaining terms to serve. Although the Constitution is silent on the administrative control of the state's court system, a court administrator's office with limited powers is established by statute.

The effect of Senate Joint Resolution 101, if approved into Law:

SJR 101 if approved by the voters will repeal Article IV of the Washington State Constitution as amended and replace it with a new Article IVA. Although the new article would be, in many respects, quite similar to the former article, there are significant changes.

The method by which the Chief Justice is selected is changed from one involving his seniority on the court to an election by a majority vote of the members of the court. In addition, the Chief Justice is made the chief administrative officer for the judicial system of the state, and empowered to supervise and direct the performance of the management and administrative duties of the judicial system. The Supreme Court is also empowered to divide the state into judicial regions for administrative purposes, and the judges of each region shall select a chief judge to serve as an administrative judge.

(Continued on Page 29.)

Statement against

Vote Against SJR 101

SJR 101 could remove taxpayer's constitutional protections. It violates the constitutional requirement that amendments be so submitted that the people may vote for or against them separately. SJR 101 contains over forty separately identifiable constitutional changes. If the Supreme Court upholds this method of submission, a damaging re-write of the Constitution's taxation and public indebtedness articles could follow.

It violates the doctrine of separation of powers by

- allowing legislators to decide whether to fund the courts;
- surrendering to legislative determination the general jurisdiction of trial courts;
- authorizing legislature to reduce Supreme Court at will;
- placing judicial branch under constitutional supervision of state auditor;
- placing Governor in de facto control of judicial qualifications commission.

If Watergate taught us anything, it is the need for an independent judiciary, unfettered by the executive or legislature.

It is a backward step in judicial reform, by

- constitutionally prohibiting merit selection and merit retention of judges, the two chief goals motivating judicial reform throughout the country.

It deprives citizens of valuable rights

It repeals constitutional requirement that Superior Courts decide cases within 90 days. It repeals requirement that Supreme Court give written reasons for its decisions.

SJR 101 raises state costs, moves power to Olympia

It places all trial court operations under administrative supervision of Supreme Court. This court has so managed the appellate court system that in seven years the appellate backlog has risen by over 50% even after the legislature created 12 new positions on the Intermediate court of appeals. SJR 101 is not judicial reform.

Rebuttal of Statement for

MODERNIZATION? Is shotgun legislative tampering with our Constitution the way to modernize? Shouldn't wholesale revision be done properly — by other means? **EFFICIENCY?** With daily trial court operations supervised by Supreme Court unable to handle Appellate Court backlog? **STATEWIDE SYSTEM?** Without assured state funding? **JUDICIAL DISCIPLINE?** By Commission substantially controlled by Governor appointing almost half its membership? **WARNING!** SJR 101 does not implement Citizens' Committee's recommendations. Be careful — you have much to lose! Vote against SJR 101.

Voters' Pamphlet Statement Prepared by:

KENT E. PULLEN, State Senator, Republican; HAL ZIMMERMAN, State Representative, Republican; and BILL SCHUMAKER, State Representative, Republican.

Advisory Committee: FRANK HALE, Former Chief Justice, State Supreme Court; ALFRED J. SCHWEPPE, Attorney, Seattle; FRANCIS E. HOLMAN, Judge of the Superior Court.



Senate Joint Resolution 127

Proposed Constitutional Amendment

Ballot Title:

Shall a commission be created to fix all legislative salaries and legislators' eligibility for election to other offices be expanded?

Vote cast by the members of the 1975 Legislature on final passage:
HOUSE [98 members]: Yeas, 67; Nays, 17; Absent or not voting, 14.
SENATE [49 members]: Yeas, 47; Nays, 1; Absent or not voting, 1.

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Senate Joint Resolution 127 begins on Page 26.

Statement for

REMOVES CONFLICT OF INTEREST

Legislators set their own salaries—an obvious conflict of interest. SJR 127 would establish an independent commission to set legislators' salaries, removing this conflict and placing legislators' compensation in the hands of the citizens.

The proposal would allow salaries to be established on a professional non-political basis and removes the issue from partisan politics.

A POLICY DECISION BY CITIZENS

At least 60% of the Commission must be chosen by lot (similar to a jury procedure) from the state's registered voters. The remaining members could be selected so as to provide experience in personnel or salary management. This would insure control by the citizen majority.

In addition, the right to file a referendum petition against any salary increase is guaranteed.

A METHOD FOR SETTING LEGISLATIVE SALARIES IS NEEDED

An annual legislative salary of \$3,600 was set in 1965 and revised by Initiative 282 by 5½% in 1973. Thus, only one 5½% increase has been made in ten years. A citizen's salary commission could keep salaries on a more current basis.

In accordance with the constitutional provision for officials who do not set their own salary, SJR 127 would allow legislators to receive an increase during their term of office, so House members serving two-year terms and Senators serving four-year terms would be treated equally.

EXTENDS EQUAL RIGHT TO RUN FOR OFFICE TO LEGISLATORS

Presently, a legislator may not be elected to an office if it was created, or if the salary was increased, during the legislator's current term. SJR 127 gives legislators the same right to run for office as other citizens, but still prohibits appointment to such an office.

Rebuttal of Statement against

Commissions serve a valuable purpose in providing direct decision making by citizens and a safeguard against excessive power in government. Since no legislator or lobbyist may be a member of this commission, it would provide a necessary safeguard against self interest.

Voters' Pamphlet Statement Prepared by:

GARY GRANT, State Senator, Democrat; SID W. MORRISON, State Senator, Republican; and HELEN SOMMERS, State Representative, Democrat.

Advisory Committee: MAXINE KRULL, President, League of Women Voters of Washington; T. PATRICK CORBETT, Judge, Washington State Magistrates' Association; WARREN BISHOP, Chairman, State Committee on Salaries for Elected Officials; JOHN S. MURRAY, State Senator, Republican.

The Law as it now exists:

Under the present state constitution the salaries of members of the state legislature, as well as other state elected officials, are fixed by the legislature or by the people in the exercise of their initiative powers. The constitution prohibits any salary increase for a legislator from taking effect during the term which the legislator was serving at the time the increase was granted. The constitution also prohibits any legislator from being appointed or elected to any other public office which was created, or the compensation of which was increased, during the legislative term for which the legislator was elected.

The effect of Senate Joint Resolution 127, if approved into Law:

SJR 127 provides for the creation of an independent commission to fix the salaries of members of the legislature, subject to review and nullification by the people by referendum.

No present or former legislator or state or local governmental officer or employee, nor any registered lobbyist, could be a member of the commission. Not less than sixty percent of the commission's members would be chosen by lot from the registered voters of the state, with one member for each congressional district. The re-

maining members would be appointed in a manner to be provided by implementing legislation.

All persons thus selected to serve on the commission would then be subject to confirmation by a superior court judge designated by the chief justice of the state supreme court. Any person found by reason of prejudice, special interests, or incompetency to be unable properly to serve as members of the commission by the superior court judge would be replaced by others chosen in the same manner as the disqualified person was originally chosen.

The commission would file any changes in salary with the secretary of state and those changes would become effective ninety days thereafter unless blocked by the filing of a referendum petition by the people. In that event, the new salaries would not take effect unless approved by the people at the next following general election.

In addition, Senator Joint Resolution No. 127 would also remove the existing prohibition against mid-term salary increases for members of the legislature and would permit legislators to be elected (but not appointed) to other public offices which were created, or the compensation of which was increased, during the legislative terms for which they were elected.

Statement against

Commissions, commissions, commissions!!! Let's not create another costly commission, answerable to no one, just to establish legislative salaries. Legislators should stand up and be counted when it comes to increasing their own salaries. Don't diminish their responsibility and your voice in government by passing this political hot potato to a commission.

In order to maintain the accountability that the voters have justifiably demanded, we urge you to defeat this constitutional amendment. Insist that legislators face up to their responsibility to listen to and be guided by the citizenry in setting salaries!

Presently, state legislators receive an annual salary of \$3,800 and must work full time in Olympia an average of about three months each year. While in Olympia they receive a \$40 per diem allowance to defray living expenses. The remainder of the year they must work part time handling miscellaneous matters in their districts and elsewhere. Instead of voting for a new commission, we suggest that you carefully consider the above facts and then write your legislator indicating your preference for the proper salary: (a) less than \$3,800; (b) between \$3,800 and \$5,999; (c) between \$6,000 and \$7,999; (d) between \$8,000 and \$10,000; or, (e) more than \$10,000. You may also send your opinion to: Salary Survey, Institutions Building, Room 115B, Olympia, Washington 98504.

Rebuttal of Statement for

Legislators don't set their own salaries — the constitution specifically prohibits such a clear conflict of interest. Before a salary increase can be realized by a legislator he or she must first be re-elected. Citizen input and legislative accountability are thus assured through the ballot box. Vote "No" on SJR 127 and keep this politically sensitive subject right where it belongs — in the laps of the legislators who answer to you, the voter.

Voters' Pamphlet Statement Prepared by:

KENT E. PULLEN, State Senator, Republican; RON DUNLAP, State Representative, Republican; and DONALD L. BOWIE.



House Joint Resolution 19

Proposed Constitutional Amendment

Ballot Title:

Shall Washington's constitution be amended to permit governmental assistance for students of all educational institutions — limited by the federal constitution?

Vote cast by the members of the 1975 Legislature on final passage:
HOUSE [96 members]: Yeas, 86; Nays, 10; Absent or not voting, 2.
SENATE [49 members]: Yeas, 39; Nays, 8; Absent or not voting, 2.

NOTE: The ballot title and explanatory statement were prepared by the Superior Court under a procedure established by law. The complete text of House Joint Resolution 19 begins on Page 28.

Statement for

HELP ALL STUDENTS

HJR 19 would amend the state constitution to make it as strict but not stricter than the U.S. Constitution, which permits limited assistance to students whether they attend public or nonpublic colleges and schools.

NO DIRECT AID TO NONPUBLIC SCHOOLS

It would not permit any direct aid to nonpublic schools, and would only provide public assistance to students to the degree already permitted by the Federal Constitution.

It simply corrects a constitutional inconsistency, giving Washington the freedom to decide whether or not to:

- Make low-interest tuition loans and grants available to needy students attending nonpublic as well as public colleges and universities.
- To include students of nonpublic elementary and secondary schools in limited but important services, such as health care, remedial help for disadvantaged and handicapped children, and other student services.

SAME ASSISTANCE AS OTHER STATES

Such assistance is presently allowable under the U.S. Constitution and is available to students in most other states. Yet many Washington students are deprived of these opportunities because of highly prohibitive and discriminatory wording in the state constitution, which is among the most restrictive of all 50 states.

CONTINUE THE DUAL SYSTEM OF EDUCATION

The need to continue the competitive system of education which offers a choice to students is now greater than ever.

America was made great and strong because of this kind of competition.

SAVING OF TAX DOLLARS

HJR 19 would encourage student freedom of choice among all educational facilities, including nonpublic colleges and schools which save Washington taxpayers over \$100 million dollars during a biennium.

IN LINE WITH FEDERAL CONSTITUTION

HJR 19 enables us to bring the state constitution in line with the U.S. Constitution.

Rebuttal of Statement against

Public money will not go to private schools. This is prohibited by U.S. Constitution and U.S. Supreme Court. Nonpublic schools save taxpayers millions of dollars. Public schools are not weakened. Competition reduces costs. No problem of Church-State separation exists in 34 states providing assistance to college students, or 26 states furnishing services to other nonpublic school students. HJR 19 has nothing to do with private school independence; only student assistance.

Voters' Pamphlet Statement Prepared by:

GORDON HERR, State Senator, Democrat; JOHN L. O'BRIEN, State Representative, Democrat; and A. J. PARDINI, State Representative, Republican.
Advisory Committee: WALT T. HUBBARD, Staff Member, Washington State Human Rights Commission; Dr. DAVID L. MCKENNA, President, Seattle Pacific College; WILLIAM J. OLWELL, State Labor Leader; CARROLL O'ROURKE, Tacoma Business Executive; Dr. PAT SMITH, Former Administrator, Kentum Hospital.

The Law as it now exists:

The Washington state constitution presently prohibits any public money or property from being appropriated for the support of any religious establishment. The state constitution also provides that all schools maintained or supported wholly or in part by public funds must be free from sectarian control or influence; and thirdly, it prohibits any gifts or loans of state or local governmental credit, funds or property to or in aid of any private individual, except for the support of the needy.

These provisions of the state constitution prohibit most forms of state or locally funded assistance for students attending private church-related schools, and to a lesser extent, for students attending other private schools and public schools as well. Specific programs which are presently unconstitutional include the use of public school buses to transport children to church-related schools, and the provision of financial assistance either directly or by means of state guaranteed loan programs for students attending either public or private schools, colleges or universities.

The First Amendment to the United States Constitution, by its "separation of church and state" provision, also restricts governmental assistance to students attending church-related educational institutions. The restrictions upon such aid resulting from this federal constitutional provision, however,

are less stringent than those now provided for by our state constitution.

It is lawful for our state constitution to be more restrictive in regard to governmental assistance for students than is the federal constitution.

The effect of House Joint Resolution 19, if approved into Law:

This proposed constitutional amendment would authorize the legislature to provide such assistance as is permitted by the United States Constitution for students of public and private educational institutions, including those which are church related for the purpose of advancing their education. The amendment would exempt such assistance from all state constitutional restrictions.

Statement against

HJR 19 will cost taxpayers more, weaken public education, violate church-state separation safeguards, and threaten private school independence.

Cost Taxpayers More

HJR 19 will allow public money to go to private schools. This is inefficient use of tax money, as reliable studies show that subsidization costs more than absorbing students into public schools.

Private education is a valuable alternative, but that is not the issue. The question is: "Should private schools be financed by all taxpayers?" No. Public funds for education should be limited to public schools under public control.

Weaken Public Schools

HJR 19 will weaken public education by diverting taxes to private schools through their students, at a time when public school seats are empty.

HJR 19 is open-ended. If it passes, can there be any doubt that there will be increased pressure for transportation aid, textbooks, "ancillary services," and direct support, with expensive law suits at each step?

Violate Church-State Separation

Most private schools have a religious affiliation. Taxpayers will be forced to underwrite doctrines they do not agree with. We should not make exceptions in constitutional principles to suit the needs of each special interest.

Threaten Private School Independence

Private schools will be subject to more governmental control. This paper will increasingly call the tune.

Don't allow private schools to become part of the public tax load. Vote against HJR 19.

Rebuttal of Statement for

We will not "save tax dollars" by spending more tax dollars subsidizing private schools. Health care, busing, remedial help, loans, grants, and other services for private schools will be a very expensive tax addition. Other states have allowed some support for private schools, at a great cost to the taxpayer and the public schools. This is why we must preserve our state constitutional guarantees. If HJR 19 passes, all taxpayers could be forced to subsidize specific religious teachings regardless of their own belief.

Voters' Pamphlet Statement Prepared by:

GEORGE SCOTT, State Senator, Republican; JOE HAUSSLER, State Representative, Democrat; and MATTHEW W. HILL, Retired Justice, State Supreme Court.



COMPLETE TEXT OF

Initiative Measure 314

TO THE PEOPLE

AN ACT Enacting the Washington Franchise Privilege Fee and Compensating Tax Code; providing penalties; adding a new Title to the Revised Code of Washington,

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

PURPOSE

NEW SECTION. Section 82A-1. Domestic corporations of this state and foreign corporations admitted to do an intrastate business in this state are privileged to carry on innumerable and profitable activities in this state in a corporate form. These corporations are currently subject to nominal and discriminatory annual corporate privilege fees. These fees are limited in amount, have a regressive impact on the smaller corporations and are measured by authorized capital stock which bears little or no relationship to the extent and to the profitability of the business opportunities afforded corporations by this state.

The purpose of this initiative is to give recognition to the fact that the privilege of engaging in business activities in this state as a corporation, regardless of the characterization of these activities for commerce clause purposes, is a substantial privilege for which commensurate fees or taxes should be charged. Inasmuch as the profitability of the corporation is a true indication of the nature and extent of the privileges enjoyed, it is the intention of this initiative to measure the corporate privilege fee by the net income derived by a corporation from the activities it carries on in this state. In order that corporations who do not conduct any intrastate business in this state may be subject to an equivalent tax for comparable privileges but which cannot, because of the commerce clause of the United States Constitution, be subjected to a corporate privilege fee, there is also imposed a compensating tax on corporations doing only an interstate business in this state.

To assure that all corporations pay some fee for the privilege of conducting business activity in this state, the existing corporate fees are not affected by this initiative. Any existing annual corporate privilege fee, however, is credited against the corporate privilege fee imposed by this initiative.

In the event the compensating tax imposed on corporations doing an interstate business in this state is declared invalid, it is nevertheless intended that the corporate privilege fee be imposed pursuant to this initiative on all profit corporations conducting any intrastate business activity in this state.

PART A DEFINITIONS—CONSTRUCTION RULES

NEW SECTION. Sec. 82A-2. (1) Construction—Meaning of Terms. Except as otherwise expressly provided or clearly appearing from the context, any term used in this Title shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 and amendments thereto or any successor law or laws relating to federal income taxes and other provisions of the statutes of the United States relating to federal income taxes as such Code, laws and statutes are in effect upon the effective date of this initiative.

(2) Generally. (a) Intent. It is the intention of this Title that the income which constitutes the measure of the corporate privilege fee and compensating tax be the same as taxable income as defined and applicable to the subject taxpayer for the same tax year in the Internal Revenue Code, except as otherwise expressly provided in this Title.

(b) Disposition of Revenues. All revenues derived from the taxes imposed by this Title shall be deposited in a special account hereby created in the state general fund and shall be used exclusively for the purpose of eliminating the need for imposition of special or

excess levies by or for school districts. Any moneys in excess of the amount needed for this purpose shall be used for any educational purpose.

(3) Short Title—Codification. This Title shall be known and may be cited as the "Washington Corporate Franchise Privilege Fee and Compensating Tax Code". Sections 82A-1 through 82A-35 of this initiative shall be codified as a new title in the Revised Code of Washington, to be numbered Title 82A.

NEW SECTION. Sec. 82A-3. Definitions and Rules of Interpretation. When used in this Title where not otherwise distinctly expressed or manifestly incompatible with the intent thereof:

(1) Corporation. The term "corporation" means, in addition to an incorporated entity, an association, trust or any unincorporated organization which is defined as a corporation in the Internal Revenue Code and in substance exercises the privileges of a corporation such as limited liability and issuance of evidences of ownership.

(2) Department. The term "department" means the department of revenue of this state.

(3) Director. The term "director" means the director of the department of revenue of this state.

(4) Financial Organization. The term "financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, building and loan association, bank holding company as defined in section 1841, chapter 17, Title 12 of the laws of the United States; credit union, currency exchange, cooperative bank, small loan company, sales finance company, or investment company, and any other corporation at least ninety percent of whose assets consist of intangible property and at least ninety percent of whose gross income consists of dividends or interest or other charges resulting from the use of money or credit.

(5) Fiscal Year. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

(6) Foreign Corporation. The term "foreign corporation" means a corporation organized under the laws of a foreign country or a corporation organized under the laws of any state or the United States which is domiciled in a foreign country.

(7) Income. The term "income" means gross income as defined in section 61 of the Internal Revenue Code and includes all items there set forth which the taxpayer is required to include in the computation of its federal income tax liability after the effective date of this initiative subject to the specific deductions and other adjustments required by this Title to arrive at "net income" and "taxable income".

(8) Internal Revenue Code. The term "Internal Revenue Code" means the United States Internal Revenue Code of 1954 or any successor law or laws relating to federal income taxes in effect upon the effective date of this initiative.

(9) Net Income. The term "net income" means taxable income prior to application of the apportionment provisions of Part D of this Title.

(10) Net Income Tax. The term "net income tax" means a tax imposed on or measured, in whole or in part, on the net income of the taxpayer.

(11) Person. The term "person" means and includes a corporation, or any of its officers or employees when so indicated in the context in which the term "person" occurs.

(12) Returns. The term "returns" includes declarations of estimated tax required under this Title.

(13) Sales. The term "sales" means all gross receipts of the taxpayer.

(14) State. The term "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision of any of the foregoing.

(15) "Fee" or "Tax". The term "fee" or "tax" includes interest and penalties, unless the intention to give it a more limited meaning is disclosed by the context.

(16) Federal Taxable Income. "Federal taxable income" means, unless specifically defined otherwise in this Title, income required to be reported to and subject to tax by the United States government

under section 63 of the Internal Revenue Code plus any special deductions for dividends by sections 241, 243, 244, 245, 246 and 247 of the Internal Revenue Code.

(17) Taxable Year. The term "taxable year" or "tax year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under this Title. "Taxable year" or "tax year" means, in the case of a return made for a fractional part of a year under the provisions of this Title, the period for which such return is made.

(18) Taxpayer. The term "taxpayer" means any corporation subject to the fee or tax imposed by this Title.

(19) Title. The term "Title" means Title 82A RCW.

PART B IMPOSITION PROVISIONS.

NEW SECTION. Sec. 82A-4. Fee Imposed on Corporations Doing Business in This State. Upon and after January 1, 1976, there is hereby imposed and levied on every corporation, for the privilege of doing or conducting any business in this state as a corporation or exercising or having the privilege of exercising any corporate franchise or privilege in this state, an annual corporate privilege fee measured by twelve percent of the taxable income of each such corporation as defined and determined in accordance with the provisions of this Title. Such fee shall be in addition to the corporate privilege fees imposed by RCW 23A.40.040, 23A.40.060, 23A.40.130, 23A.40.140 and 23A.40.150 (subject to the credit provisions contained in section 82A-25(2) of this Title).

NEW SECTION. Sec. 82A-5. Compensating Tax Imposed on Corporations Not Subject to the Privilege Fee Imposed by Section 82A-4. Upon and after January 1, 1976, for the privilege of receiving, earning or otherwise acquiring income from any source whatsoever subsequent to December 31, 1975, there is levied and imposed on every corporation not subject to the corporate privilege fee imposed by section 82A-4 of this Title, a compensating tax equal to twelve percent of the corporation's taxable income.

NEW SECTION. Sec. 82A-6. Incidence of Privilege Fee. Upon and after January 1, 1976, the corporate privilege fee imposed on corporations by section 82A-4 of this Title shall be paid by every corporation, unless expressly exempted by this Title, which conducts any activity in this state for which this state can constitutionally impose any corporate privilege fee. Liability for the corporate privilege fee imposed by section 82A-4 shall commence at the time any such activity is conducted in this state or the date any corporation is authorized by the corporate laws of this state to do business in this state whichever is earlier and shall cease only when a corporation ceases to conduct any activity in this state for which this state can constitutionally impose any corporate privilege fee or the date a corporation ceases to be qualified to do business in this state, whichever is later.

NEW SECTION. Sec. 82A-7. Incidence of Compensating Tax. Upon and after January 1, 1976, the compensating tax imposed by section 82A-5 shall be paid by every corporation, not subject to the corporate privilege fee and not expressly exempt under this Title, which conducts any activity in this state or derives any income from sources within or attributable to this state for which this state can constitutionally impose an income tax. Liability for the compensating tax shall commence at the time and continue for the period of time any such corporation conducts any such activity in this state or derives any such income from this state and is not also subject to the corporate privilege fee imposed by section 82A-4 on such activity or measured by such income.

PART C TAXABLE INCOME

NEW SECTION. Sec. 82A-8. Taxable Income Defined. (1) "Taxable income" for the purpose of computing the corporate franchise privilege fee and the compensating tax means federal taxable income subject to the following adjustments:

(a) Add taxes on or measured by net income to the extent such taxes have been excluded or deducted from gross income in the computation of federal taxable income.

(b) Add the amount of any deduction taken pursuant to section

613(b)(1) of the Internal Revenue Code.

(c) Add an amount equal to all amounts paid or accrued to the taxpayer as interest or dividends during the taxable year to the extent excluded from gross income or deducted in the computation of federal taxable income.

(d) Add in the case of a Western Hemisphere trade corporation, China Trade Act corporation, or possessions company described in section 931(a) of the Internal Revenue Code, an amount equal to the amount deducted or excluded from gross income in the computation of federal taxable income for the taxable year on account of the special deductions and exclusions (but in the case of a possessions company, net of the deductions allocable thereto) allowed such corporations under the Internal Revenue Code.

(e) Any adjustments resulting from the apportionment provisions of Part D of this Title and the accounting provisions of section 82A-26.

(2) If for the taxable year of a corporation, there is in effect an election under section 992(a) of the Internal Revenue Code or the corporation is treated as a domestic international sales corporation as defined in section 992(a)(3) of the Internal Revenue Code, the corporation shall be subject to the privilege fee or compensating tax imposed by this Title on its taxable income as defined and accounted for in the Internal Revenue Code for such corporation subject to the adjustments contained in this section.

PART D APPORTIONMENT PROVISIONS

NEW SECTION. Sec. 82A-9. Adjustments to Taxable Income—Apportionment Rules. (1) In General. (a) All of the net income of any corporation which is not taxable in another state shall be apportioned to this state.

(b) Any corporation which is taxable in this state and another state shall apportion its net income as provided in this Title.

(2) Taxable in Another State. For purposes of apportionment of net income under this Title, a corporation is taxable in another state if that state has jurisdiction to subject the corporation to a corporate privilege fee if the corporation is taxable under section 82A-4 of this Title, or to a net income tax if the corporation is taxable under section 82A-5.

If a corporation has not filed a net income tax return in another state for the tax year and that state imposes a net income tax, unless the corporation is expressly exempted from that state's net income tax, the corporation is deemed not to be subject to either a corporate privilege fee or net income tax in that state for that tax year.

NEW SECTION. Sec. 82A-10. Apportionment of Net Income. All net income, other than net income from transportation services and financial organizations, shall be apportioned to this state by multiplying the net income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, excluding any negligible factor and the denominator of which is three reduced by the number of negligible factors. "Negligible factor" means a factor the denominator of which is less than ten percent of one-third of the taxpayer's gross income.

NEW SECTION. Sec. 82A-11. Property Factor. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned and used or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned and used or rented and used in all states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-12. Valuation of Property—Rented Property. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals but not less than zero.

NEW SECTION. Sec. 82A-13. Average Value of Property. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the director may require the averaging of monthly values during the tax period if reasonably required to properly reflect the average value of the taxpayer's property.

NEW SECTION. Sec. 82A-14. Payroll Factor. The payroll factor is a fraction, the numerator of which is the total amount paid in the state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid in all states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-15. Compensation Paid Within State. Compensation is paid in this state if:

(1) The individual's service is performed entirely within the state; or

(2) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(3) Some of the service is performed in the state and

(a) the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is in the state; or

(b) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

NEW SECTION. Sec. 82A-16. Sales Factor. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year and the denominator of which is the total sales of the taxpayer in all states.

"Sales", as used in this section means all gross receipts from:

(1) sales of tangible personal property;

(2) rentals of tangible personal property;

(3) sales of real property held for sale in the ordinary course of a taxpayer's trade or business;

(4) rentals of real property; and

(5) sales of services.

NEW SECTION. Sec. 82A-17. Sales of Tangible Personalty, Real Property, Rentals and Services Within State. Sales of tangible personal property are in this state if:

(1) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(2) The property is shipped from an office, store, warehouse, factory or other place of storage in this state and (a) the purchaser is the United States government or (b) the taxpayer is not taxable in the state of the purchaser.

(3) The sale is made from an office located in this state to a purchaser (including the United States government) in another state in which the taxpayer is not taxable and the property is shipped to the purchaser from a state in which the taxpayer is not taxable.

(4) Sales and rentals of real property are in this state if the property is located in this state.

(5) Rentals of tangible personal property are in this state to the extent that the property is used in this state.

(6) Sales of services are in this state to the extent that the service is performed in this state.

NEW SECTION. Sec. 82A-18. Interstate Transportation Services. The taxable income of a taxpayer whose activities consist of transportation services for hire rendered partly within this state and partly within another state shall be determined under the provisions of sections 82A-19 through 82A-22.

NEW SECTION. Sec. 82A-19. Interstate Transportation Other Than Oil or Gas by Pipeline or Air Carriers, Apportionment. In the case of net income from transportation services other than that derived from the transportation service of oil or gas by pipeline or air carriers, the net income attributable to Washington sources is that portion of the net income of the taxpayer derived from transportation services wherever performed that the revenue miles of the taxpayer in Washington bear to the revenue miles of the taxpayer in all the states in which the taxpayer is taxable on such services for the tax year. A revenue mile means the transportation for a consideration of one net ton in weight or one passenger the distance of one mile. The net income attributable to Washington sources in the case of a taxpayer engaged in the transportation both of property and of individuals shall be that portion of the entire net income of the taxpayer which is equal to the average of his passenger miles and ton mile fractions, separately computed and individually weighted by the ratio of gross receipts from passenger transportation to total gross

receipts from all transportation, and by the ratio of gross receipts from freight transportation to total gross receipts from all transportation, respectively.

NEW SECTION. Sec. 82A-20. Interstate Transportation of Oil by Pipeline—Apportionment. In the case of net income derived from the transportation of oil by pipeline, net income attributable to Washington shall be that portion of the net income of the taxpayer derived from the pipeline transportation of oil in all the states in which the taxpayer is taxable for the tax year that the barrel miles transported in Washington bear to the barrel miles transported by the taxpayer in all the states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-21. Interstate Transportation of Gas by Pipeline—Apportionment. In the case of net income derived from the transportation of gas by pipeline, net income attributable to Washington shall be that portion of the net income of the taxpayer derived from the pipeline transportation of gas in all the states in which the taxpayer is taxable for the tax year that the thousand cubic feet miles transported in Washington bear to the thousand cubic feet miles transported by the taxpayer in all the states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-22. Air Carriers—Apportionment. In the case of net income derived by a taxpayer as a carrier by aircraft, the portion of net income of such carrier attributable to Washington shall be the average of the following two percentages:

(1) The revenue tons handled by such air carrier at airports within this state for the tax year divided by the total revenue tons handled by such carrier at airports in all states in which the taxpayer is taxable for the tax year;

(2) The air carrier's originating revenue within this state for the tax year divided by the total originating revenue of such carrier from all states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-23. Financial Organizations—Apportionment. The net income of a financial organization attributable to Washington sources shall be taken to be:

(1) In the case of net income of a taxpayer whose activities are confined solely to this state, the entire net income of such taxpayer.

(2) In the case of net income of a taxpayer who conducts activities as a financial organization partially within and partially without this state, that portion of its net income as its gross business in this state is to its gross business in all the states in which the taxpayer is taxable for the same tax year, which portion shall be determined as the sum of:

(a) Fees, commissions or other compensation for financial services rendered within this state;

(b) Gross profits from trading in stocks, bonds or other securities managed within this state;

(c) Interest and dividends received within this state;

(d) Interest charged to customers at places of business maintained within this state for carrying debt balances of margin accounts, without deduction of any costs incurred in carrying such accounts; and

(e) Any other gross income resulting from the operation as a financial organization within this state, divided by the aggregate amount of such items of the taxpayer in all states in which the taxpayer is taxable for the tax year.

NEW SECTION. Sec. 82A-24. Exceptions. (a) If the apportionment provisions of this Title do not fairly represent the extent of the taxpayer's activities in this state, the taxpayer may petition for or the director may require, if reasonable:

(1) the exclusion of any one or more of the factors;

(2) the inclusion of one or more additional factors or the substitution of one or more factors; or

(3) the employment of any other method to effectuate an equitable apportionment.

(b) If the apportionment provisions of this Title in combination with the allocation and apportionment provisions of other states in which a corporation is required to pay a tax on or measured by net income results in the apportionment or allocation of more than one hundred percent of the corporation's taxable income for the same year, the director may make any adjustment to the apportionment provisions of this Title he deems will fairly represent the corpora-

tion's income attributable to this state in light of the attribution rules of other states in which the taxpayer is required to pay a tax on or measured by net income for the same tax year.

PART E CREDITS AND EXEMPTIONS

NEW SECTION. Sec. 82A-25. (1) Exemptions. A corporation organized for any purpose set forth in RCW 24.03.015 and whose property or income shall not inure directly or indirectly to the private benefit or gain of any individual or shareholder shall be exempt from the corporate privilege fee and compensating tax imposed by this Title.

(2) Credits. The amount of any annual privilege fees paid by any corporation pursuant to RCW 23A.40.060, 23A.40.140 and 23A.40.150 shall be allowable as a credit against the privilege fee imposed by this Title for the same taxable year.

PART F ACCOUNTING PROVISIONS

NEW SECTION. Sec. 82A-26. Combined Reporting—Administrative Adjustments. (1) In the case of a corporation liable to report under this Title owning or controlling, either directly or indirectly, another corporation, or other corporations except foreign corporations, and in the case of a corporation liable to report under this Title and owned or controlled, either directly or indirectly, by another corporation except a foreign corporation, the department may require a combined or consolidated report showing the combined taxable income and apportionment factors of the controlled group except foreign corporations and any other information it deems necessary to ascertain the taxable income of any corporation subject to either the corporate privilege fee or the compensating tax. The department is authorized and empowered, in such manner as it may determine, to assess the tax against the corporations which are liable to report under this Title and whose taxable income is involved in the report upon the basis of the combined entire taxable income; or it may adjust the tax in such other manner as it shall determine to be equitable if it determines such adjustment to be necessary in order to prevent evasion of fees or taxes or to reflect the income earned by said corporations from business done in this state. Direct or indirect ownership or control of more than fifty percent of the voting stock of a corporation shall constitute ownership or control for purposes of this section.

(2) In the case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in or having income from sources allocable to this state, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the department may distribute, apportion or allocate income, deductions, credits or allowances between or among such organizations, trades, or businesses, if it determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of the corporate privilege fee or compensating tax imposed by this Title.

NEW SECTION. Sec. 82A-27. Method of Accounting. (1) For purposes of the computation of the corporate privilege fee and compensating tax imposed under this Title, a corporation's method of accounting shall be the same as such corporation's method of accounting for federal income tax purposes. If no method of accounting has been regularly used by a corporation, taxable income for purposes of this Title shall be computed under a method prescribed by or acceptable to the department.

(2) It is the intent of this Title that taxable income as defined in this Title for the subject taxpayer for computation of the corporate privilege fee and the compensating tax be ascertained and returned as provided herein on the same accounting method or methods used by the taxpayer in computing his federal income tax liability.

NEW SECTION. Sec. 82A-28. Tax Returns for Partial Year. In the event that the first taxable year of any corporation with respect to which a fee or tax is imposed by this Title ends prior to December 31st of the calendar year 1976 or any other calendar year in which this Title becomes effective (hereinafter referred to as a fractional taxable year), the taxable income for such fractional taxable year shall be the taxpayer's taxable income, computed in accordance

with the otherwise applicable provisions of this Title, for the entire taxable year, adjusted as follows:

(1) Such taxable income shall be multiplied by a fraction, the numerator of which is the number of days in the fractional taxable year and the denominator of which is the number of days in the entire taxable year; or

(2) If the taxpayer so elects, such taxable income shall be adjusted, in accordance with rules of the department, so as to include only such income and be reduced only by such deductions as are attributable to such fractional taxable year, as can be clearly determined from the permanent records of the taxpayer.

PART G ADMINISTRATIVE PROVISIONS

NEW SECTION. Sec. 82A-29. Starting Date—Time and Manner of Payment. (1) The corporate privilege fee and compensating tax shall be due and payable in reference to the taxable income, as defined by this Title, which is earned, received or otherwise acquired by any corporation subject to the fee or tax imposed by this Title subsequent to December 31, 1975 for federal income tax purposes.

(2) The time and manner of payment of the fee or tax imposed by this Title shall be in accordance with the provisions of the Internal Revenue Code (including the provisions relating to installment payments of estimated income tax) and the regulations promulgated thereunder providing for the time and manner of the payment of the federal income tax; PROVIDED, That the department by regulation may make such modifications and exceptions to such provisions as it deems necessary to facilitate the prompt and efficient collection of the fee or tax.

(3) Regardless of any extension of time granted for filing a final federal income tax for any tax year, the corporate privilege fee imposed by section 82A-4 shall be paid at the time the corporation files its annual report with the secretary of state or any successor officer. No corporation shall be qualified to do business in this state if it is delinquent in the payment of the corporate privilege fee imposed by section 82A-4 of this Title.

NEW SECTION. Sec. 82A-30. General Administrative Provisions. The general administrative provisions pertaining to the compliance, enforcement and administration of tax laws administered by the department contained in the following sections of chapter 82.32 RCW are applicable to this Title: 82.32.050 (except references therein to registration), 82.32.060, 82.32.070 (except the last paragraph), 82.32.080, 82.32.090, 82.32.100 (except reference therein to registration), 82.32.105, 82.32.110, 82.32.120, 82.32.130, 82.32.140, 82.32.150, 82.32.160, 82.32.170, 82.32.190, 82.32.200, first paragraph of 82.32.210, 82.32.220, 82.32.230, 82.32.235, 82.32.240, 82.32.260, 82.32.290 (except references therein to certificates of registration), 82.32.300, 82.32.310, 82.32.320, 82.32.330, 82.32.340, 82.32.350, 82.32.360, and 82.32.380.

NEW SECTION. Sec. 82A-31. Board of Tax Appeals Jurisdiction. Jurisdiction is hereby conferred on the state board of tax appeals to review any claim for refund or deficiency assessment of either the corporate privilege fee or compensating tax imposed by this Title. In all cases in which the board has jurisdiction under this section:

(1) The taxpayer or the department may elect either a formal or informal hearing according to rules of practice and procedure promulgated by the board; and

(2) The provisions of RCW 82.03.100 through 82.03.120, RCW 82.03.150 through 82.03.170 and RCW 82.03.190 shall be applicable with respect to hearings and decisions.

NEW SECTION. Sec. 82A-32. Judicial Review on Appeal From Board. Within thirty days after the final decision of the board in a case in which it has jurisdiction and in which a formal hearing has been elected, the taxpayer or the department may appeal to the court of appeals or the state supreme court as provided by law.

NEW SECTION. Sec. 82A-33. Section headings and captions included in this Title do not constitute any part of the law.

NEW SECTION. Sec. 82A-34. Tax Compact. To the extent that Article IV of chapter 82.56 RCW is in conflict with Part D of this Title, the Article is hereby superseded.

NEW SECTION. Sec. 82A-35. Severability. If any section, subdivision of a section, paragraph, sentence, clause or word of this Title

tive for any reason shall be adjudged invalid, this shall not invalidate the remainder of this initiative but shall be confined in its operation to the section, subdivision of a section, paragraph, sentence, clause or word of the initiative directly involved in the controversy in which such judgment shall have been rendered. If any fee or tax imposed under this initiative shall be adjudged invalid as to any person, corporation, association, institution or class of persons, corporations, institutions or associations included within the scope of the general language of this initiative such invalidity shall not affect the liability of any person, corporation, association, institution or class of persons, corporations, institutions, or associations as to which such fee or tax has not been adjudged invalid. It is hereby expressly declared that had any section, subdivision of a section, paragraph, sentence, clause, word or any person, corporation, institution, association or class of persons, corporations, institutions or associations as to which this initiative is declared invalid been eliminated from the initiative at the time the same was considered the initiative would have nevertheless been enacted with such portions eliminated.

In the event the compensating tax imposed pursuant to section 82A-5 is declared invalid, it is nevertheless the intention of the people that all other provisions of this initiative would have been enacted without such section and intend that such section is severable.



COMPLETE TEXT OF

Initiative Measure 316

TO THE PEOPLE

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.



COMPLETE TEXT OF

Referendum Bill 35

Chapter 89, Laws of 1975, 1st ex. sess.

AN ACT Relating to United States senators; amending section 29.68.070, chapter 9, Laws of 1965 and RCW 29.68.070; and providing for the submission of this act to a vote of the people.

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

Section 1. Section 29.68.070, chapter 9, Laws of 1965 and RCW 29.68.070 are each amended to read as follows:

When a vacancy happens in the representation of this state in the senate of the United States the governor shall make a temporary appointment until the people fill the vacancy by election at the next ensuing general state election occurring during an even-numbered year. Such temporary appointment shall be from a list of three names submitted to the governor by the state central committee of the same political party as the senator holding office prior to the vacancy. A vacancy occurring after the first day for filing specified in RCW 29.18.030 and prior to the general state election shall be filled by election at the next ensuing general state election occurring during an even-numbered year.

NEW SECTION, Sec. 2. This amendatory act shall be submitted to the people for their adoption and ratification, or rejection, at a special election hereby ordered by the legislature, which election shall be held in conjunction with the general election to be held in this state on the Tuesday next succeeding the first Monday in November, 1975, all in accordance with the provisions of section 1, Article II of the Constitution of the state of Washington, as amended, and the laws adopted to facilitate the operation thereof.



**EXISTING
CONSTITUTIONAL
PROVISIONS**

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**PROPOSED
CONSTITUTIONAL
AMENDMENT**



**THESE CONSTITUTIONAL PROVISIONS WOULD BE
REPEALED BY SENATE JOINT RESOLUTION 101**

ARTICLE IV

Section 1. Judicial power, where vested. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Sec. 2. Supreme court. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on nonjudicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

Sec. 2(a). Temporary performance of judicial duties. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

Sec. 3. Election and terms of supreme judges. The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judge having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occurs in the office of a judge of the supreme court the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court, first elected, shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

Sec. 3(a). Retirement of supreme court and superior court judges. A judge of the supreme court or the superior court shall retire from judicial office at the end of the calendar year in which he attains the age of seventy-five years. The legislature may, from time to time, fix a lesser age for mandatory retirement, not earlier than the end of the calendar year in which any such judge attains the age of seventy years, as the legislature deems proper. This provision shall not affect the term to which any such judge shall have been elected or ap-



COMPLETE TEXT OF

**Senate Joint
Resolution 101**

Proposed Constitutional Amendment

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

THAT, At the next general election to be held in the state there shall be submitted to the qualified voters of the state for their approval and ratification, or rejection, an amendment to the Constitution of the state of Washington repealing all of Article IV as amended by Amendment 25, Amendment 28, Amendment 38, Amendment 41, and Amendment 50, and adopting in lieu thereof as Article IVA the following:

**ARTICLE IVA
THE JUDICIAL SYSTEM**

Article IVA, section 1. JUDICIAL SYSTEM: (1) Court System. The judicial power of the state shall be vested in a judicial system which shall be divided into one supreme court, a court of appeals, a superior court, a district court and such other courts as may be established by law.

(2) Court of Record. The supreme court, the court of appeals, and the superior court shall be courts of record. Any other court may be made a court of record by law.

(3) Right of Review. All parties shall be entitled to at least one review, except in civil cases of minor significance as designated by law. A trial de novo, as authorized by law, does not constitute a review.

(4) Operations. When necessary for the effective administration of justice, justices and judges may, pursuant to law, be directed or permitted to perform, temporarily, judicial duties in any court of record. Any justice or judge may also, upon request and at his discretion, temporarily perform judicial duties in any court not of record. Retired justices or judges may, upon request and at their discretion, temporarily perform judicial duties in any court as provided by law.

(5) Decisions. All determinations of causes by any court shall be documented as required by law or rule.

(6) Decision Time Limits. The legislature, by law, shall prescribe time limits from the time of the submission of the cause within which decisions shall be rendered. The time limits shall not be less than six months for the supreme court, not less than four months for the court of appeals, and not less than three months for the superior court.

(7) Funding. The legislature shall provide the method of funding the operations of the courts to the extent it deems necessary.

(8) The judicial branch of the government of the state shall be subject to fiscal post-audit by the state auditor of receipts and expenditures of public funds within its control to the extent provided by law.

Article IVA, section 2. SUPREME COURT. (1) Number. The supreme court shall be not less than five nor more than nine justices as may be provided by law.

(2) Writs and Process. The supreme court shall have discretionary jurisdiction in habeas corpus, quo warranto, mandamus, certiorari, review and prohibition. It shall also have the power to issue writs, including such writs as the legislature may ordain, and process necessary or appropriate to secure justice to the parties and in aid of its jurisdiction.

(3) Appellate Jurisdiction. The supreme court shall have appellate jurisdiction over all judgments imposing a sentence of death or life



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pointed prior to, or at the time of approval and ratification of this provision. Notwithstanding the limitations of this section, the legislature may by general law authorize or require the retirement of judges for physical or mental disability, or any cause rendering judges incapable of performing their judicial duties.

Sec. 4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

Sec. 5. Superior court—Election of judges, terms of, etc. There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election; PROVIDED, That until otherwise directed by the legislature one judge only shall be elected for the counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield and Asotin; one judge for the counties of Kittitas, Yakima and Klickitat; one judge for the counties of Clark, Skamania, Pacific, Cowlitz and Wahklakum; one judge for the counties of Thurston, Chehalis, Mason and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan and Clallam; and one judge for the counties of Whatcom, Skagit and Shohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this Constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this Constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Sec. 6. Jurisdiction of superior courts. The superior court shall

imprisonment and shall have power to assume appellate jurisdiction over any other court decision. Appellate jurisdiction of decisions of other courts or administrative agencies shall be exercised as provided by law or by rule authorized by law.

Article IVA, section 3. COURT OF APPEALS. (1) Number. The number of judges of the court of appeals shall be as provided by law.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by law or rule authorized by law.

Article IVA, section 4. SUPERIOR COURT. (1) Number. The number of judges of the superior court shall be as provided by law.

(2) Jurisdiction. The superior court shall have original jurisdiction in all cases except as to any limited original or concurrent jurisdiction as may be assigned to other courts by the legislature. The superior court shall also have such appellate jurisdiction as may be assigned by law. Judges of the superior court shall have the power to issue writs, including such writs as the legislature may ordain, and process necessary or appropriate to secure justice to parties and in aid of its jurisdiction.

Article IVA, section 5. DISTRICT COURTS. (1) Number. The number of judges of the district court shall be as provided by law.

(2) Jurisdiction. The district court shall have such jurisdiction as may be assigned by the legislature, provided, such courts shall not have jurisdiction of felonies or in civil cases where the boundaries or title to real property shall be in question.

Article IVA, section 6. JUDGES PRO TEMPORE. A case in the superior court or district court may be tried by a judge, pro tempore, who must be admitted to the practice of law in the state of Washington, agreed upon by the parties litigant or their attorneys of record, approved by the court and sworn to try the case. Such service shall not preclude such person from holding another public office during or after his service as a judge pro tempore.

Article IVA, section 7. ELIGIBILITY OF JUSTICES AND JUDGES. To be eligible for appointment or election to a judicial position in a court of record, the person must be domiciled within the state, a citizen of the United States, and admitted to the practice of law in the state of Washington. To be eligible for appointment or election to a judicial position in a district court, the person must meet all of the requirements of a judge sitting in a court of record except that a person who has been elected and has served as a justice of the peace or as a district court judge in Washington shall not be required to be admitted to the practice of law in the state of Washington.

Article IVA, section 8. ELECTION, APPOINTMENT AND TERMS OF JUSTICES AND JUDGES. (1) Method. Justices and judges shall be elected by the electorate as provided by law; PROVIDED, No person who meets the qualifications in Article IVA, section 7, other than a judge removed from office pursuant to Article IVA, section 13(3), shall be precluded from filing as a candidate for election to a judicial position.

(2) Term of Office. The term of office for justices of the supreme court and for judges of the court of appeals shall be six years and for judges of the superior court and the district court four years commencing on the second Monday in January following the election of the justice or judge. The term of office for judges of any other courts as may be established by the legislature shall be as provided by law.

(3) Vacancies in Judicial Positions. If a vacancy occurs in the office of a justice of the supreme court or a judge of the court of appeals or the superior court, the governor shall appoint a person residing in the electoral area served by such court to hold the office until the election and qualification of a justice or judge to fill the vacancy, which election shall take place at the next succeeding general election, and the justice or judge so elected shall hold office for the remainder of the unexpired term. A vacancy in the office of a judge of a district court or of a judge of any other courts as may be estab-



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have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one thousand dollars, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

Sec. 7. Exchange of judges—Judge pro tempore. The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case.

Sec. 8. Absence of judicial officer. Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office; PROVIDED, That in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

Sec. 9. Removal of judges, attorney general, etc. Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. Such resolution shall be entered at length on the journal of both houses and on the question of removal the ayes and nays shall also be entered on the journal.

Sec. 10. Justices of the peace. The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace; PROVIDED, That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. Justices of the peace shall have original jurisdiction in cases where the demand or value of the property in controversy is less than three hundred dollars or such greater sum, not to exceed one thousand dollars, as shall be prescribed by the legislature. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.

Sec. 11. Courts of record. The supreme court and the superior

shall be filled as provided by law.

(4) Electorate. The electorate of the entire state shall vote on justices of the supreme court. The electorate for other judges shall be as provided by law.

(5) Times of Voting. Justices and judges shall be voted on at general elections unless provided otherwise by law.

(6) Nonpartisan. All judicial elections shall be nonpartisan.

Article IVA, section 9. OATHS. Every justice and judge shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitutions of the United States and of the state of Washington, and will faithfully and impartially discharge his judicial duties to the best of his ability, which oath shall be filed in the office of the secretary of state.

Article IVA, section 10. COMPENSATION. Compensation for justices and judges shall be fixed and paid as provided by law but shall not be diminished during the term of a justice or judge.

Article IVA, section 11. RESTRICTION. (1) Practice of Law and Other Employment. No justice or judge of a court of record or full time district court judge shall engage in the practice of law or hold other employment inconsistent with canons of judicial conduct during the time in which he holds office.

(2) Politics. Any justice or judge shall, during his tenure in office, be ineligible to hold any other office or public employment other than a judicial office; nor shall he make contributions for the election of any public official nor engage in any political activities inconsistent with canons of judicial conduct.

Article IVA, section 12. RETIREMENT. Any justice or judge shall retire from office at the end of the calendar year in which the age of seventy-five years is attained. The legislature may provide for a lesser age for mandatory retirement, not earlier than the end of the calendar year in which any justice or judge attains the age of seventy years.

Article IVA, section 13. DISCIPLINE AND REMOVAL. (1) Judicial Qualifications Commission. There shall be a commission on judicial qualifications. The commission shall be composed of an appellate court judge, appointed by the chief justice, a superior court judge, selected by the superior court judges, a district court judge, selected by the district court judges, two lawyers admitted to the practice of law in the state of Washington appointed by the bar association of the state and four lay citizens selected by the governor. Procedures of the commission and the terms of office of its members shall be prescribed by law.

(2) Powers of Commission. The judicial qualifications commission for cause may recommend to the supreme court that any justice or judge be suspended, removed or otherwise disciplined for misconduct in office or for willful or persistent failure to perform his duties or for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may also recommend to the supreme court that a justice or judge be retired for disability seriously interfering with the performance of his duties which is of a permanent character.

(3) Supreme Court Review. Upon a recommendation for disciplinary action by the judicial qualifications commission, the supreme court shall hold a hearing to review the records of the proceedings of the commission on the law and facts, and in its discretion, may order retirement, suspension, removal, or any other appropriate discipline as it finds just and proper. Upon an order for involuntary retirement for a permanent disability, the justice or judge shall thereby be retired with the same rights and privileges as if he retired pursuant to law. Upon an order for removal, the justice or judge shall thereby be removed from office and his salary shall cease from the date of such order. On the entry of an order for retirement or for removal, the office shall be deemed vacant.

Article IVA, section 14. THE CHIEF JUSTICE. (1) Selection and Term. The chief justice shall be selected from the elected member-



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courts shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.

Sec. 12. Inferior courts. The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.

Sec. 13. Salaries of judicial officers—How paid, etc. No judicial officer, except court commissioners and unsalaried justices of the peace, shall receive to his own use any fees or prerequisites of office. The judges of the supreme court and judges of the superior courts shall severally at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected. In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

Sec. 14. Salaries of supreme and superior court judges. Each of the judges of the supreme court shall receive an annual salary of four thousand dollars (\$4,000); each of the superior court judges shall receive an annual salary of three thousand dollars (\$3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of judges herein provided.

Sec. 15. Ineligibility of judges. The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office, or employment, during the term for which they shall have been elected.

Sec. 16. Charging juries. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Sec. 17. Eligibility of judges. No person shall be eligible to the office of judge of the supreme court, or judge of a superior court, unless he shall have been admitted to practice in the courts of record of this state, or of the Territory of Washington.

Sec. 18. Supreme court reporter. The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.

Sec. 19. Judges may not practice law. No judge of a court of record shall practice law in any court of this state during his continuance in office.

Sec. 20. Decisions, when to be made. Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; PROVIDED, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a hearing.

Sec. 21. Publication of opinions. The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person.

Sec. 22. Clerk of the supreme court. The judges of the supreme court shall appoint a clerk of that court who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court, and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

Sec. 23. Court commissioners. There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the

ship of the supreme court by a majority vote of the court for a term of four years and shall serve at the pleasure of the court. He may be selected to not more than two consecutive terms as chief justice upon a majority vote of the court, but no such selection shall extend the term of a justice. The term of the chief justice first selected shall commence on the effective date of this article and continue for the term herein provided and until his successor is selected by the court.

(2) Administrative Role. The chief justice shall be the chief administrative officer of the judicial system of the state of Washington and shall supervise and direct the performance of the management and administrative duties of the judicial system and shall preside at sessions of the supreme court. The supreme court may select an acting chief justice from the membership of the supreme court pursuant to rule to perform the duties of the chief justice in his absence.

Article IVA, section 15. PROCEDURE. The supreme court shall have authority to adopt rules for the procedure of all courts.

Article IVA, section 16. MANAGEMENT AND ADMINISTRATION. (1) Responsibility. Responsibility for the management and administration of the judicial system shall be vested in the supreme court and exercised pursuant to supreme court rule unless provided otherwise by law.

(2) Court Administrator. The supreme court shall appoint a court administrator and such other personnel as the court may deem necessary to aid the administration of the courts.

(3) Administrative Regions. The state may be divided into judicial regions for administrative purposes pursuant to supreme court rule. A region may embrace one or more trial court levels and one or more counties.

(4) Chief Judge. The judges of such administrative regions as shall be created by supreme court rule shall select one of their members to serve as chief administrative judge. Such chief administrative judge shall serve for such period of time as may be provided by supreme court rule. Subject to rules of the supreme court, the chief administrative judge of a region shall have general administrative authority over all courts within his region.

Article IVA, section 17. COURT COMMISSIONERS. The legislature may, by law, provide for court commissioners for each trial court level.

Article IVA, section 18. CHARGING JURIES. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Article IVA, section 19. CLERK OF THE SUPERIOR COURT. The county clerk shall be, by virtue of his office, clerk of the superior court.

Article IVA, section 20. TRANSITION AND SAVINGS. The adoption of this article shall not be construed to affect any existing right acquired under any statute, rule, regulation, resolution, ordinance, or order promulgated pursuant to and taking its validity from such superseded constitutional provision; nor as affecting any actions, activities, or proceedings validated thereunder, nor as affecting any civil or criminal proceedings instituted thereunder, nor the term of office, or appointment or employment of any person appointed or elected thereunder. All rights coming into existence and occurring on or after the effective date of this article shall be governed by the provisions of this article as though the article superseded hereby never existed.

Article IVA, section 21. EFFECTIVE DATE. This article, if approved by the voters, will become effective on the tenth day of January, 1977.

Article IVA, section 22. NEW ARTICLE. Sections 1 through 20 of this joint resolution shall constitute a new article number IVA in the Constitution of the state of Washington.

Article IVA, section 23. REPEALER. The following article of the Constitution of the state of Washington, or parts thereof, or amendments thereto, are each hereby repealed:



**EXISTING
CONSTITUTIONAL
PROVISIONS**

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**PROPOSED
CONSTITUTIONAL
AMENDMENT**



superior court at chambers; subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

Sec. 24. Rules for superior courts. The judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.

Sec. 25. Reports of superior court judges. Superior judges, shall on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest; and the judges of the supreme court shall on or before the first day of January in each year report in writing to the governor such defects and omissions in the laws as they may believe to exist.

Sec. 26. Clerk of the superior court. The county clerk shall be by virtue of his office, clerk of the superior court.

Sec. 27. Style of process. The style of all process shall be, "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

Sec. 28. Oath of judges. Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

Sec. 29. Election of superior court judges. Notwithstanding any provision of this Constitution to the contrary, if, after the last day as provided by law for the withdrawal of declarations of candidacy has expired, only one candidate has filed for any single position of superior court judge in any county containing a population of one hundred thousand or more, no primary or election shall be held as to such position, and a certificate of election shall be issued to such candidate. If, after any contested primary for superior court judge in any county, only one candidate is entitled to have his name printed on the general election ballot for any single position, no election shall be held as to such position, and a certificate of election shall be issued to such candidate: PROVIDED, That in the event that there is filed with the county auditor within ten days after the date of the primary, a petition indicating that a write in campaign will be conducted for such single position and signed by one hundred registered voters qualified to vote with respect of the office, then such single position shall be subject to the general election. Provisions for the contingency of the death or disqualification of a sole candidate between the last date for withdrawal and the time when the election would be held but for the provisions of this section and such other provisions as may be deemed necessary to implement the provisions of this section, may be enacted by the legislature.

Sec. 30. Court of appeals. (1) AUTHORIZATION. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) JURISDICTION. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) REVIEW OF SUPERIOR COURT. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

(4) JUDGES. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) ADMINISTRATION AND PROCEDURE. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

(6) CONFLICTS. The provisions of this section shall supersede any conflicting provisions in prior sections of this article.

(1) Article IV, sections 1 through 30.

(2) Amendment 25.

(3) Amendment 28.

(4) Amendment 38.

(5) Amendment 41.

(6) Amendment 50.

BE IT FURTHER RESOLVED, That the secretary of state shall cause the foregoing constitutional amendment to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state.



**EXISTING
CONSTITUTIONAL
PROVISIONS**

NOTE: The proposed constitutional amendment which appears on this page repeals or modifies the effect of other provisions of the state constitution. These affected provisions are printed in the left-hand column of the page so that voters may readily compare them to the proposed changes, in the right-hand column of the page, and determine how the existing constitutional language would be affected.

**PROPOSED
CONSTITUTIONAL
AMENDMENT**



**THESE CONSTITUTIONAL PROVISIONS WOULD BE
REPEALED BY SENATE JOINT RESOLUTION 127:**

Article II, Section 13

LIMITATION ON MEMBERS HOLDING OFFICE IN THE STATE. No member of the legislature, during the term for which he is elected, shall be appointed or elected to any civil office in the state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

Article II, Section 23

COMPENSATION OF MEMBERS. Each member of the legislature shall receive for his services five dollars for each day's attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature, on the most usual route.

**THE EFFECT OF THESE CONSTITUTIONAL PROVISIONS
WOULD BE MODIFIED, BUT NOT REPEALED, BY SENATE
JOINT RESOLUTION 127:**

Article II, Section 1

LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election.



COMPLETE TEXT OF

**Senate Joint
Resolution 127**

Proposed Constitutional Amendment

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

THAT, At the general election to be held in this state on the first Tuesday next succeeding the first Monday in November, 1975, there shall be submitted to the qualified electors of this state, for their approval and ratification, or rejection, a proposal to amend Article XXVIII of the Constitution of the state of Washington by amending section 1 thereof to read as follows:

Article XXVIII, section 1. All elected state officials shall each severally receive such compensation as the legislature may direct. The compensation of any state officer shall not be (~~increased or~~) diminished during his term of office (~~except that the legislature, at its thirty-first regular session, may increase or diminish the compensation of all state officers whose terms exist on the Thursday after the second Monday in January, 1949~~). No member of the legislature, during the term for which he is elected, shall be appointed to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, by the legislature during the term for which he was elected. Salaries for members of the legislature shall be fixed by an independent commission created by law for that purpose. No state official, member or former member of the state legislature, state employee, or official or employee of a political subdivision, municipal corporation, or special district of the state, or person required to register with a state agency as a lobbyist, shall be a member of the commission. No less than sixty percent of the membership of the commission shall be chosen by lot by the secretary of state from among the registered voters of the state, with one member from each congressional district. The balance of the membership shall be appointed as provided by law. All persons selected by lot or appointed shall possess the qualifications required by law of jurors. All persons chosen shall be confirmed by a superior court judge designated by the chief justice of the supreme court who shall examine each person for interest, prejudice, and competency. Persons who by reasons of prejudice, interest, or incompetency are found to be incapable of discharging their duties as members of the commission shall be disqualified and shall be replaced by persons chosen in the same manner in which the disqualified person was originally chosen. The term of office of the members of the commission shall be as determined by law, and no member of the commission may be removed except for cause specified by law, following a hearing by a tribunal of three superior court judges appointed by the chief justice of the supreme court. Any change of salary shall be filed with the secretary of state and shall become law ninety days thereafter without action of the legislature or governor, but shall be subject to referendum petition by the people, filed within said ninety days. Referendum measures under this section shall be submitted to the people at the next following general election, and shall be otherwise governed by the provisions of this Constitution generally applicable to referendum measures. The salaries fixed pursuant to this section shall supersede any other provision for the salaries of members of the legislature, Sections 13 and 23 of Article II are hereby repealed, and the provisions of sections 14, 16, 17, 19, 20, 21, and 22 of Article III and section (~~29~~) 1 of Article II insofar as they are inconsistent herewith, are hereby repealed.

BE IT FURTHER RESOLVED, That the secretary of state shall cause notice of the foregoing constitutional amendments to be published at least four times during the four weeks next preceding the election



**EXISTING
CONSTITUTIONAL
PROVISIONS**

NOTE: The proposed constitutional amendment which appears on this page repeals or modifies the effect of other provisions of the state constitution. These affected provisions are printed in the left-hand column of the page so that voters may readily compare them to the proposed changes, in the right-hand column of the page, and determine how the existing constitutional language would be affected.

**PROPOSED
CONSTITUTIONAL
AMENDMENT**



When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. 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.

(d) The filing of a referendum petition against one or more items, sections or parts of any act, law or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular elections, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: PROVIDED, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election. These provisions supersede the provisions set forth in the last paragraph of section 1 of this article as amended by the seventh amendment to the Constitution of this state.

In every legal newspaper in the state.

 EXISTING CONSTITUTIONAL PROVISIONS	NOTE: The proposed constitutional amendment which appears on this page repeals or modifies the effect of other provisions of the state constitution. These affected provisions are printed in the left-hand column of the page so that voters may readily compare them to the proposed changes, in the right-hand column of the page, and determine how the existing constitutional language would be affected.	PROPOSED CONSTITUTIONAL AMENDMENT 
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**THESE PRINCIPAL CONSTITUTIONAL PROVISIONS
COULD BE AFFECTED BY HOUSE JOINT RESOLUTION 19:**

Article I, Section 11

RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: **PROVIDED, HOWEVER,** That this article shall not be so construed as to forbid the employment by the state of a chaplain (or such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief, to affect the weight of his testimony.

Article VIII, Section 5

CREDIT NOT TO BE LOANED. The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.

Article VIII, Section 7

CREDIT NOT TO BE LOANED. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

Article IX, Section 4

SECTARIAN CONTROL OR INFLUENCE PROHIBITED. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.



COMPLETE TEXT OF

**House Joint
Resolution 19**

Proposed Constitutional Amendment

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

THAT, At the next general election to be held in this state there shall be submitted to the qualified voters of the state for their approval and ratification, or rejection, an amendment to the Constitution of the state of Washington by adding a new article to read as follows:

Article, Section 1. To the extent permitted by the Constitution of the United States, and notwithstanding any other provision of the Constitution of the state of Washington to the contrary, the legislature may provide assistance for students of public and private schools, and for students of public and private institutions for post secondary or higher education, for the purpose of advancing their education, regardless of the creed or religious affiliation of the students, or the creed or religious affiliation, influence, or nature of the educational entity which they attend.

BE IT FURTHER RESOLVED, That the secretary of state shall cause notice of the foregoing constitutional amendment to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state.

Explanatory Statement for Senate Joint Resolution
101, continued from Page 11:

The new judicial article would provide a new method for removing a judge or justice from office. A commission on judicial qualifications is established, to be composed of an Appellate Court Judge, a Superior Court Judge, a District Court Judge, all of whom are selected by Judges, two lawyers selected by the Bar Association and four lay citizens selected by the Governor. The commission is authorized to recommend to the State Supreme Court the removal, suspension, retirement, or other appropriate discipline for a judge whom they find has failed to perform his duties, has been involved in conduct which brings the judicial office into disrepute, or is disabled. Upon receipt of the recommendation, the Supreme Court is empowered to order retirement, suspension, removal, or any other appropriate discipline it finds just and proper.

The new article provides that all parties have a right to at least one review, except in civil cases of minor significance.

District Courts not referred to in the present Constitution would have jurisdiction over any cases permitted by statute except those involving the commission of a felony or in civil cases where the title to real property is in question.

The authority of the legislature to permit the appointment of court commissioners is expanded to include courts other than the Superior Courts, and the present constitutional restrictions on the authority of commissioners are eliminated.

Official Candidates Pamphlet

General Election, Tuesday, November 4, 1975

Because of the statewide election for the position of Secretary of State, a Candidates' Pamphlet section containing the statements and photographs of the two nominees is included in this official Voters' Pamphlet. Under a new law approved by the Legislature, only statewide offices are covered in the Candidates' Pamphlet in an odd-numbered year. The office of the Secretary of State has no authority to comment on the accuracy of any statements made by the candidates in this pamphlet or to alter their content in any way.



Secretary of State

One-year unexpired term



**Bruce K.
CHAPMAN**
Republican

My priorities after nine months in office are still curtailed spending, reduced paperwork for citizens, and Legislative approval of your right to vote on basic structural changes in Olympia. Recent scandals underscore the need for clear, reliable checks on conflicts of interest. I am pushing for a more enforceable Code of Ethics for all state officeholders.

Within my own office, I have reduced the staff by 12% since January. We have twice as many filings as twelve years ago, yet operate with fewer employees. I seek to streamline election functions, consolidate corporate forms, and eliminate unnecessary storage of old files. I have proposed elimination altogether of some 44 forms that citizens must file with the Secretary of State.

The opposition advocates opening new sections to handle several unrelated and duplicative government programs. I oppose such expansions which really are intended only to find justification for retaining the position of Secretary of State as a political office.

I have accepted gladly the directorship of state government activities for the Bicentennial and am proud our office can house the Task Force on Aging. No budget increases are needed for these. But I will resist adding costly, permanent programs and bureaucracy.



**Kay D.
ANDERSON**
Democrat

Kay D. Anderson, Washington born, raised and educated. Elected Snohomish County Clerk, 1970; reelected, 1974 with highest primary vote in county. Experienced administrator and records manager.

Believes the office should remain elective, as elected officials are more accountable to the public. It has been two decades since a woman has held statewide elective office in Washington, it's time for a woman's point of view in the executive branch of state government again.

Would work towards increasing the efficiencies of the office, fulfilling the statutory requirements; bringing back duties to the office that have been transferred to other state departments; establishing a bipartisan commission to study election reform, simplified voter registration, ballot security, and set policies for printing reports that would be made available to all parties and citizens. Would like to have the Office become more actively involved in solving citizens' problems, serving as an ombudsman, a liaison between the citizens and state government.

Past-president of the Washington State Association of County Clerks, member of Soroptimist and Toastmistress. Presently serving on the Boards of the Washington State Association of County Officials; International Association of Clerks, Recorders, Election Officials and Treasurers, United Way and Snohomish County Democratic Central Committee.

How to Obtain an Absentee Ballot:

Any registered voter who cannot vote in person may apply directly to his county auditor or department of elections for an absentee ballot. Any signed request containing the necessary information will be honored. For your convenience, an application is reproduced below. The addresses of the auditors or departments of election are also listed below. In order to be certain that the voters' application is authentic, the election laws require that the signature on the application be verified by comparison with the signature on the voter's permanent registration record. For this reason, if a husband and wife both wish to vote by absentee ballot, signatures of each are necessary. In order to be counted, an absentee ballot must be voted and postmarked no later than the day of the election. For this reason, sufficient time must be allowed for an exchange of correspondence with the county auditor or department of elections.

COUNTY	ADDRESS	CITY	ZIP	COUNTY	ADDRESS	CITY	ZIP
Adams	County Courthouse	Ritzville	99169	Levitt	1105 North Street	Chehalis	98512
Asotin	135 Second Street	Asotin	99402	Lincoln	450 Logan Street	Owenston	99122
Benton	County Courthouse	Prosser	99350	Mason	Fourth & Alder	Silverton	98504
Chelan	County Courthouse	Wenatchee	98001	Okanogan	140 Third North	Okanogan	98840
Chittam	319 South Lincoln	Port Angeles	98302	Pacific	Memorial Avenue	South Bend	98506
Clark	12th & Franklin	Vancouver	98660	Pend Oreille	628 West Fourth	Newport	99156
Columbia	341 East Main	Dayton	99320	Pierce	930 Tacoma Avenue	Tacoma	98402
Cowlitz	309 Academy Street	Kalama	98626	San Juan	First & Court	Friday Harbor	98250
Cowapo	County Courthouse	Waterville	98850	Skagit	205 Kincaid Street	Mount Vernon	98273
Ferry	County Courthouse	Republic	99166	Skamania	County Courthouse	Stevenson	98648
Franklin	1016 North Fourth	Pasco	99301	Snohomish	3000 Rockefeller	Everett	98201
Garfield	County Courthouse	Pomeroy	99347	Spokane	1116 West Broadway	Spokane	99201
Grant	CP Street NW	Ephrata	98823	Stevens	South Oak Street	Colville	99114
Grays Harbor	100 West Broadway	Monticello	98563	Thurston	11th & Capitol Way	Olympia	98501
Island	Suvenh & Main	Coupeville	98239	Wahkiakum	County Courthouse	Callhamet	98617
Jefferson	Jefferson & Gays	Port Townsend	98358	Walla Walla	315 West Main	Walla Walla	99362
King	500 Fourth Avenue	Seattle	98104	Whitcom	311 Grand Avenue	Bellingham	98225
Kitsap	614 Division Street	Port Orchard	98366	Whitman	North Main Street	Colfax	99111
Kittitas	205 West Fifth	Ellensburg	98926	Yakima	North 2nd & East "B"	Yakima	98901
Klickitat	County Courthouse	Goldendale	98620				

CLIP FORM OUT ON THIS LINE

Absentee Ballot Request

I HEREBY DECLARE THAT I AM A REGISTERED VOTER
PRINT NAME FOR POSITIVE IDENTIFICATION

AT
ADDRESS CITY OR TOWN ZIP

PHONE NO. PRECINCT
(IF KNOWN)

SEND MY BALLOT TO: SAME ADDRESS AS ABOVE: THE ADDRESS BELOW:

.....
STREET ADDRESS CITY OR TOWN STATE ZIP

This application is for the state general election to be held November 4, 1975.

**TO BE VALID, YOUR
SIGNATURE MUST
BE INCLUDED**

SIGNATURE X

SIGNATURE X

Note: If husband and wife both want absentee ballots, signatures of each are necessary.

FOR OFFICE USE ONLY

REGISTRATION NUMBER PRECINCT CODE LEG. DIST.

REGISTRATION VERIFIED DEPUTY SIGNATURE BALLOT MAILED

BALLOT CODE ADDRESS CHANGE BALLOT RETURNED

Official Voters Pamphlet

General Election, Tuesday, November 4, 1975

Wash. AGO 1976 NO. 15 (Wash.A.G.), 1976 WL 168499

Office of the Attorney General

State of Washington

AGO 1976 No. 15

August 5, 1976

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

*1 (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.

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

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

*2 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. [[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...."

*3 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 9A.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

*4 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 imposed³ and (b) because the procedural safeguards of this approach appeared reasonably calculated to insure a rational imposition of the penalty.

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 [[to Alan Bluechel, State Representative on February 14, 1973]](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 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:

*5 "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 provides for the automatic, mandatory, imposition of a death sentence for all persons convicted of aggravated murder in the first degree⁸ 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:

"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."

*6 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

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 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

*7 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 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 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."

*8 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 9A.32.040, both of which originated with the new code itself, chapter 260, Laws of 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.

*9 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

APPENDIX

MODEL PENAL CODE - DEATH PENALTY PROVISION

*10 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.

*11 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.

*12 (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.

Footnotes

- 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.
- 4 See, Roe v. Wade, 410 U.S. 113, 35 L. ed. [[L.Ed.]]2d 147, 93 S.Ct. 705 (1973) and Doe v. Bolton, 410 U.S. 179, 35 L. ed. [[L.Ed.]]2d
201, 93 S.Ct. 739 (1973).
- 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 [[to Earl F. Tilly, State Representative
on January 22, 1976]].
- 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.
- 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.
"(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 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."
- 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. § 92L.141 (Sup. 1976-1977); and
Texas Code of Crim. Proc., Art. 37.071 (Sup. 1975-1976).
- 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 Supreme 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.
- 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."

Wash. AGO 1976 NO. 15 (Wash.A.G.), 1976 WL 168499

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SHORT TITLE: Enacting the "Comprehensive Sentencing Act of 1977"

SPONSORS: House Judiciary Committee (Originally sponsored by
Representatives Enbody, Knowles and McKibbin)

COMMITTEE: Senate Judiciary

ANALYSIS AS OF: May 9, 1977

ISSUE:

In November 1975 Initiative 316, enacting a death penalty for aggravated murder in the first degree, was adopted by the voters. The United States Supreme Court in July 1976 ruled that the death penalty statutes in North Carolina and Louisiana were unconstitutional because of their mandatory features. The Court, however, upheld death penalty statutes in Georgia, Florida, and Texas and in this series of opinions laid out the essential elements of a constitutional death penalty statute. The Court stated that a death penalty statute must allow the sentencing body, in determining the penalty, to focus on two essential criteria: (1) the circumstances of the offense; and (2) the individual, with room for discretion, and the exercise of mercy and mitigation.

The State Attorney General in a formal opinion has stated that the death penalty statute adopted by the voters in 1975 is similar to the type of death penalty found unconstitutional by the U. S. Supreme Court and would, if challenged in the courts, be held likewise unconstitutional. Such a challenge is currently on appeal to the state supreme court from a superior court determination that Washington's law could be enforced.

SUMMARY:

The bill amends the existing death penalty statutes for the purpose of conforming them to the dictates of the 1976 U. S. Supreme Court opinions.

The bill redefines the crime of aggravated murder in the first degree and provides a two-step sentencing procedure for determining whether the death penalty or life imprisonment without possibility of parole or release should be imposed.

Definition of aggravated murder in the first degree

The crime of aggravated murder in the first degree is committed if the defendant:

- (1) (a) Commits murder in the first degree with premeditation (RCW 9A.32.030 (1) (a));

- (b) The crime is committed in any one of 10 aggravating circumstances; and
 - (c) There are none of the 7 mitigating circumstances sufficiently substantial to call for leniency; or
- (2) (a) Commits murder in the first degree with premeditation or without premeditation but under circumstances manifesting an extreme indifference to human life (RCW 9A.32.030 (1) (a) or (b));
- (b) The crime is committed in the course of or in furtherance of, or in immediate flight from the crime of:
 - (1) robbery 1 or 2
 - (2) rape 1 or 2
 - (3) burglary 1
 - (4) arson 1
 - (5) kidnapping for ransom or to obtain a shield or hostage; and
 - (c) There are none of the 7 mitigating circumstances sufficiently substantial to call for leniency.

Findings of the jury at guilt phase

The jury in determining whether the defendant is guilty of aggravated murder in the first degree must make a special finding on the aggravating and mitigating circumstances:

- (1) If there is not a unanimous finding of an aggravating circumstance, the defendant is sentenced to life imprisonment as for the crime of murder 1;
- (2) (a) If the jury cannot reach unanimous agreement on both aggravating or mitigating circumstances issues, the defendant is sentenced to life imprisonment as for the crime of murder 1;
- (b) If the jury is deadlocked on mitigating circumstances issues and has found an aggravating circumstance, the defendant is sentenced to life imprisonment without possibility of parole or release;
- (c) If the jury is deadlocked on both the aggravating and mitigating circumstances issues, the defendant is sentenced to life imprisonment as for the crime of murder 1.

- (3) If there is a unanimous finding of an aggravating circumstance and a finding that one or more mitigating circumstance justifies leniency, the defendant is sentenced to life imprisonment without possibility of parole or release.

Death penalty hearing

The determination of the penalty is made by the jury which determined guilt following a special hearing conducted after the guilty verdict or plea of guilty has been entered. Relevant hearsay can be presented as long as the defendant has an opportunity to rebut any hearsay statements.

The jury must return special findings on the following issues which must be established beyond a reasonable doubt:

- (1) That the evidence at trial established the guilt of the defendant with clear certainty;
- (2) That there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

If a negative finding on either issue is returned, the defendant is sentenced to life imprisonment without possibility of parole or release.

Appellate review

An automatic review by the supreme court is required whenever the death penalty is imposed.

The court, in addition to considering any normal errors specified in the appeal, shall determine:

- (1) Whether the evidence supports the jury's findings on the penalty;
- (2) Whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, making specific reference to those cases.

TRANSCRIPT OF PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES

Fiftieth Day, April 29, 1977 SUB. HOUSE BILL NO. 615

THIRD READING

Mr. Enbody: There have been many long hours put in on this bill by Representative Smith's subcommittee, and as you might expect, there has been a very large diversification of opinion on this issue of whether or not we ought to have a death penalty. The previous initiative that was passed by the people is such that today we are going to need two-thirds to amend the initiative. It's probably not as strong and as strict as many people would like, and on the other hand it's probably more strict than some others would like. With Representative Tilly's and Representative Smith's approval I think we have a bill here that represents a wide variety of opinions on the issue of death penalty.

The statute requires in order to place an individual to death there must be a finding of murder one and in most murder trials there is usually the opportunity for the jury to find murder one, murder two and in some instances, manslaughter. Under the particular bill the jury must find beyond a reasonable doubt that the individual was guilty of committing the crime of murder in the first degree. The fact is not substantial and sufficient under this bill to execute that particular individual. To show you the strength of what reasonable doubt means in our current judicial system, I brought with me a pattern instruction on reasonable doubt which states that the jury is instructed that the doubt which entitles the defendant to an acquittal must be a doubt for which a reason exists and the jury is not to go beyond the evidence to hunt up doubts or entertain doubts that are merely vague, imaginary or conjectural. Even after the jury finds murder in the first degree they are then required to look at aggravating or mitigating circumstances. Under the bill if there are not aggravating circumstances then the individual will receive life imprisonment--ordinary life in prison which under the statutes is not less than twenty years, which means that with good time he's out in thirteen if he's lucky.

Aggravating circumstances as defined in this bill, are that the victim was known or should have been known to have been a firefighter or law enforcement

official; number two that the defendant was a state prisoner, either in prison on leave, an escapee or in temporary custody or the defendant was a hired killer, or the defendant hired another to commit the murder; that the murder was committed to interfere with political or governmental functions; that the victim was a government official or employee murdered for exercising his official duties; a multiple victim situation and that the murder was committed incident to a first or second degree robbery or rape, a first degree burglary or arson or kidnapping for ransom; or that the prior conviction was for a class A homicide or a class A felony; or that as a result of the obstruction of the activities of a news writer. So that as you can see there are some pretty exceptional circumstances that would even justify an aggravating circumstance. If they do find an aggravating circumstance, no mitigating circumstances, the individual will receive life without possibility of parole. If there are aggravating circumstances and no mitigating circumstances sufficient to justify leniency we are next in the situation where the jury then decides did this individual commit the crime, not just beyond a reasonable doubt, but with clear certainty, which is a standard greater than beyond reasonable doubt, but less than all possible doubts. Further the jury must determine unanimously whether there are circumstances that would indicate that the individual will commit further violent crimes in the future. All those procedures must be followed. All twelve jurors must agree. I think there are reasonable safeguards such that we do not have to be concerned that perhaps we are convicting an innocent individual and executing an innocent individual. I urge your support of the bill.

POINT OF INQUIRY

Mr. Smith yielded to question by Mr. Tilly.

Mr. Tilly: "Representative Smith, as Chairman of the subcommittee on this subject, I would like to have your opinion as to what the word 'probability' would mean—what percentage that would indicate? On page 5, line 10 it says, 'Where there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'"

Mr. Smith: "This, of course, is one of the questions a jury must answer unanimously in the affirmative before they can execute an individual. This language was taken from the Texas statute which has been upheld by the United States Supreme Court and the use of the word 'probability' in the law is that it would be more than fifty-one percent—or fifty-one percent more likely, it's the same as preponderance of evidence. The next would be beyond a reasonable doubt, which would be considerably higher."

Mr. Tilly: I'm going to urge the body to vote for this. This is an amendment to Initiative 316 which is the initiative the people of this state approved by more than 69%. It does take a constitutional majority of this House if it is to pass. Many people have worked hard on this. It's not as tough a bill as I would have liked but I'm sure the opponents of capital punishment feel that it's tougher than they like. I believe it is a reasonable bill; it's balanced and it is fair. It provides fair and equal justice.

Mr. Shinpoch: I rise to oppose this bill. I oppose it on philosophical grounds. Statistically we still convict more people that are poor and in the minority. In those places where they do have death penalties that are still constitutional they do execute more people that are poor or in the minorities. The manner in which we have established this bill with the mitigating circumstance those people who can support something other than a little old country lawyer I'm sure will be able to find mitigating circumstances and they are not going to be executed and I think that's wrong. I think this bill is wrong. Until such time as you have equal justice irrespective of the amount of money you have, then I think the death penalty is wrong. I think what we've done with the amendment today here just makes it worse than it was. I find it very interesting that the three people who are on the main amendment were members of the Judiciary Committee where it failed. I appear to be the only voice vote against that amendment on the floor. I kind of wondered where the rest of the committee were that turned it down. I don't think the bill is fair; I think it will only be imposed against the poor; it will only be imposed against minorities and I suggest we turn it down.

Mr. Hanna: Backing up Representative Shinpoch, I am one of the delinquent Judiciary Committee members. I thought before you vote on this you might want to know just a few facts. Since 1890 we've executed 3200 people in the United States and 2600 were black. A good percentage of the rest who have been executed were from other minority groups. In some of the states where executions have taken place blacks have been executed ten times as often as white people for exactly the same crime.

POINT OF INQUIRY

Mr. Smith yielded to question by Mr. Douthwaite.

Mr. Douthwaite: 'I understand there is an important court case with respect to Washington state death penalty. Would you explain to the body how this bill will dovetail or will match, I hope, if it does pass, that court case which is pending?'

Mr. Smith: 'I will yield to Representative Knowles.'

Mr. Knowles: 'The conviction that you are speaking of occurred either in Pierce or King County. Of course, it's based on the initiative which is the current law in the state of Washington until our Supreme Court declares it unconstitutional. In the opinions rendered by the Attorney General and various prosecuting attorneys about the state, the initiative as it was passed by virtue of the Supreme Court case which was issued after that time, would be unconstitutional. It is my understanding also that there has been a conviction under that initiative and that the Superior Court in that case did hold it constitutional. So now it's up to the Supreme Court to determine whether or not that initiative is constitutional. This task force set about however to try to examine the laws dealing with capital punishment in those states whose capital punishment laws had been declared constitutional and attempted to put together a bill here that would meet the test of constitutionality.'

POINT OF INQUIRY

Mr. Knowles yielded to question by Mr. Smith.

Mr. Smith: "Representative Knowles, can you describe for the record, what you understood to be the committee's intent in developing section 6(1)(a) particularly as it was amended here on the floor today?"

Mr. Knowles: "What the committee intended here was for the protection of those instances where an innocent man might be convicted, only to find later that someone else had committed that crime. The committee felt that just using the reasonable doubt standard, which is all that's necessary for conviction, but to use that reasonable doubt standard to determine whether or not you're going to take that man's life, we ought to have a little higher standard. I forget the exact language that was in the subcommittee bill, but there was a lowering of that standard by committee amendment and using that language that we've adopted today, it would satisfy the concerns of the Judiciary Committee in adopting that standard which is a little higher than a reasonable doubt."

Mr. Smith: "Representative Knowles, do you recall that the language in the substitute bill recommended by the committee was beyond any doubt?"

Mr. Knowles: "Yes, that was the language used."

Mr. Smith: "Section 3 describes the possible sentence following conviction of aggravated murder in the first degree shall be punishment by confinement in a state institution for life without possibility of release by the parole board for any reason. That is no work release, furlough, etc. Was it the intent of the committee to, in any way, affect the authority of the Governor to pardon a convicted offender by this section or any provision of the bill?"

Mr. Knowles: "No, there is nothing in the bill that would, in any way, restrict the right of any Governor to issue a pardon. That's an executive authority and I doubt seriously if we could change it by statute even if it was in the bill."

Mr. Smith: I apologize to Representative Shinpoch for not discussing with him which floor amendment was adopted, but he was not correct when he said it was the same as the amendment rejected in committee. The amendment rejected in committee would have eliminated the hearing that the Supreme Court has favored so strongly in which the jury decides whether or not to impose the death penalty. That's an important part of this bill because the jury now has three options: If they find aggravated murder they get life imprisonment without parole and they then move into a death penalty hearing and they have these two standards to answer. The intent of these standards is to avoid the execution of innocent people or disadvantaged minorities. I believe this language does that and I would urge your vote.

Mr. Struthers: I rise to support this bill. I believe the committee has worked it well; I believe the committee has built into the bill many safeguards of the fears that have been talked about in the past. I believe the government has provided many of the agencies to protect those who in the past have been convicted of a crimes that perhaps weren't so. I think this is something that a society today is asking us to implement and I believe from a laymen's point of view the death penalty will help society.

Mr. Enbody: Briefly in response to Representative Hanna's argument. The law has changed substantially, not only in just the murder statutes, but in all of our criminal fields, many more protections exist now than they did in the 1890's. We're not talking particularly about the deep South, but the state of Washington. The argument that the rich will go without punishment and the poor will be the ones who are executed--if you will recall, I have already stated the necessary aggravating circumstances--even a country lawyer can show mitigating circumstances as they are enumerated in this bill if they could. On page 3 of the bill you will find them listed. The jury can find that the defendant has no significant history of prior criminal activity, that at the time the murder was committed, even though he may not be insane, legally insane, he was under the influence of extreme mental disturbance, the victim the consented to the homicidal act, that the defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor, so although three or four people may be committing a first degree robbery or what have you, even though a murder was committed, and under the law as it now stands, each one of those individuals, whether they pull the trigger or not, are liable. If this individual who has already been convicted beyond a reasonable doubt has no active participation or minimal participation, the death penalty won't even come up. I haven't listed all of the mitigating circumstances. Another important one would be age, but we're not in a situation where once a person is convicted of first degree murder he's automatically executed.

Representatives Smith, Struthers and Enbody spoke in favor of passage of the bill.
Mr. Newhouse demanded the previous question and the demand was sustained.

ROLL CALL

The Clerk called the roll on the final passage of Engrossed Substitute House Bill No. 615, and the bill failed to pass the House by the following vote: Yeas, 63; nays, 25; not voting, 10.
Voting yeas: Representatives Adams, Amen, Barnes, Barr, Bauer, Bender, Berentson, Blair, Boldt, Chandler, Clayton, Conner, Craswell, Decolo, Dunlap, Ehlers, Enbody, Erak, Ertelson, Fincher, Fischer, Fortson, Fuller, Gaines, Gallagher, Ollieand, Greengo, Grinn, Haley, Hanson, Hughes, Hurley M., Keller, Kilbury, Knowles, Leckenby, Lee, Martins, May, McCormick, McKibbin, Newhouse, North, O'Brien, Owen, Pardin, Patterson, Pearsall, Polk, Sanders, Schmitt, Sherman, Shinoda, Smith, Sommers, Struthers, Toller, Tilly, Vrooman, Walk, Winsley, Zimmerman, and Mr. Speaker.
Voting nays: Representatives Becker, Burns, Charette, Charney, Clemente, Douthwaite, Eng, Gruger, Hanna, Hawkins, Hurley G. S., King, Knedlik, Kreidler, Lux, Lysen, Nelson D., Nelson G. A., Pruitt, Salinas, Shlapoch, Thompson, Valle, Warrack, Williams.
Not voting: Representatives Bond, Flanagan, Grier, Heck, Maxie, Moreau, Oliver, Paris, Whiteside, Wilton.

Engrossed Substitute House Bill NO. 615, having failed to receive the two-thirds constitutional majority, was declared lost.

MOTION FOR RECONSIDERATION

Mr. Knedlik, having voted on the prevailing side, moved that the House immediately reconsider the vote by which Engrossed Substitute House Bill No. 615 failed to pass the House.

Mr. Knedlik: I'm inclined to vote with Representative Shinpoch but for an entirely different reason. This bill is entirely too soft; however it is a reasonable compromise in that it faces up to the fact that we need a two-third majority to modify the initiative and it provides absolutely exquisite procedural safeguards. Representative Smith is to be commended for the considerable amount of work that he has done to assure that no one innocent will ever be convicted and sentenced to death in this state. It doesn't go far enough in the sense that it protects special classes of people such as ourselves. It doesn't protect the general public in the sense that they are not public officials; they are not firemen; they are not within the class that's going to create aggravating circumstances. As a reasonable compromise we certainly do owe to the people of the state of Washington an opportunity to have a fair death penalty when they have spoken so clearly in your districts and in mine and with the exception of the 43rd Legislative District, I don't know of any district that didn't speak very clearly to this issue and I think we ought to take notice of that.

Mr. King demanded the previous question, and the demand was sustained.
The motion was carried.

MOTIONS

On motion of Mr. Pardini, further consideration of Engrossed Substitute House Bill No. 613 was deferred, and the bill was ordered placed at the top of the third reading calendar of the next working day.

THIRD READING

ENGROSSED SUBSTITUTE HOUSE BILL NO. 615, by Committee on Judiciary
 (Originally sponsored by Representatives Enbody, Knowles and McKibbin);
 Enacting the 'Comprehensive Sentencing Act of 1977.'

Mr. Enbody: I think the matter was covered quite thoroughly on Friday and I'll hold my remarks very briefly. I think the provision could be a lot stronger for the death penalty and it's a result of a compromise worked out with people who are vitally interested in the bill and to keep it as fair as possible. I urge your support.

Mr. Knowles: We talked a great deal about this bill on Friday and I think those of you who were here pretty well have your minds made up. Those of you who were not here will have an opportunity to vote on a matter that the people spoke very firmly about in the last election. I'd like to use this moment to compliment the committee. Look at the ^{composition} ~~composition~~ of that committee. Representative Tilly who has always been interested in this and was very vital in the adoption of the initiative. Representative Smith, who like myself, probably sat through more hearings on this matter than anybody on the floor. I was trying for awhile to justify capital punishment on the basis of deterrent factors. I'm not convinced there is any, but I am convinced that the rights of the public can be served as punishment against some of those individuals who have absolutely no regard for human life. I think this bill is kind of a tender balance between the rights of the people and the rights of an individual. It may not be perfect, but I hope it will pass the tests of constitutionality and I feel it will. We need two-thirds vote to pass the bill and I hope you will join with me in voting affirmatively.

Mr. Lux: I reluctantly rise to speak against this bill. Yesterday or last Friday you heard Representative Shinpoch and several others express some strong feelings of how they felt about this issue. This is a philosophical issue and I feel the same way about war as I do about this issue--it's very touchy and I realize that a majority of the people who I feel through emotionalism and a lack of ability to deal with our social problems and struck out and I feel also that the people who have worked on this committee and drafted this legislation a dozen time over with good conscience, but I just feel that I could not vote for this with all due respect to all the effort that has been given to it.

Mr. Smith: Realizing it may be very difficult, if not impossible to change anybody's mind on the floor of the House, I would like to point out a couple of provisions of this bill that are different from any other death penalty bill we've considered since I've been here and I think worthy of support by some of you who have some grave doubts about their wisdom and appropriateness. One of the things the death penalty legislation has done many times in the past has brought the execution of innocent people. There are many cases, some 65 cases that were cited by a study of convicting the innocent and other studies have provided additional cases in which innocent people have been executed. This bill is drafted with the primary purpose in mind of avoiding and taking every reasonable precaution of avoiding the execution of innocent people. I feel that this is an opportune time to pass this legislation and I would hope that it would pass with a two-thirds vote at this time, because it will probably be the only death penalty law in the country which takes that extra step to guard against the imposition of the death penalty against innocent people. It would also provide--and this I think the public is more interested in than execution--it would provide for life imprisonment without benefit of parole. I was out on the stump two years ago debating against the adoption of Initiative 316 and I spoke many, many times to various kinds of groups against the initiative and the thing that kept coming back, the bottom line response from many citizens, was they didn't necessarily want people executed if they could just be sure they wouldn't be back out on the streets again in thirteen years. Under this bill if you are convicted of one of these aggravated murders, one of these very serious and awful killings, you would in fact receive a life prison sentence without possibility of parole. There are two reasons why I hope this bill gets the two-thirds vote today and I don't think we can do this well in the future.

ROLL CALL

The Clerk called the roll on reconsideration of final passage of Engrossed Substitute House Bill No. 615, and the bill passed the House by the following vote: Yeas, 69; nays, 27; not voting, 2.

Voting yeas: Representatives Adams, Amen, Barnes, Barr, Bauer, Bender, Berentson, Blair, Boldt, Chandler, Clayton, Craiswell, Decelo, Dunlap, Ehlers, Embury, Erak, Erickson, Fancher, Fischer, Flanagan, Fortson, Fuller, Gaines, Gallagher, Gilliland, Greeno, Grier, Grimm, Haley, Hansen, Heck, Hughes, Hurley M., Keller, Kilbury, Knedlik, Knowles, Leckenby, Lee, Lyson, May, McCormick, McKibbin, Nelson G. A., Newhouse, North, O'Brien, Oliver, Owen, Pardini, Patterson, Pearsall, Poik, Sanders, Schmitzen, Sherman, Shinoda, Smith, Sommers, Struthers, Tallor, Tilly, Yrooman, Walk, Whiteside, Winsley, Zimmerman, and Mr. Speaker.

Voting nays: Representatives Becker, Burns, Charette, Charnley, Clements, Conner, Douthwaite, Eng, Gruger, Hanna, Hawkins, Hurley G. S., Kling, Kredler, Lux, Maxie, Moreau, Nelson D., Paris, Pruitt, Salafino, Shlnpoch, Thompson, Valle, Warnke, Williams, Wilson.

Not voting: Representatives Bond, Martinis.

Engrossed Substitute House Bill No. 615, having received the constitutional two-thirds majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

JUNE 3, 1977

MOTION

Mr. Smith moved that the House do concur in the Senate amendments to Engrossed Substitute House Bill No. 615.

Mr. Smith: Although the amendment appears to be very lengthy and substantial, it is basically a rewrite of the bill we sent over there changing procedurally some of the elements of the death penalty bill we sent over, but leaving the substance of the provisions intact. In other words, almost the exact language establishing the aggravating circumstances and the mitigating circumstances that the jury would consider for imposing the death penalty are in this amendment. They kept the clear certainty standard, that has to be determined by the jury, a standard somewhat higher than beyond a reasonable doubt. There was a floor amendment in section 8 that was in this bill that actually we don't like some of the phraseology of, however the understanding we have of that language is the existing self-defense statute providing that you can use reasonable force that is necessary to protect yourself or someone else on your property. I urge concurrence with the amendment.

Mr. Tilly: I believe the Senate amendment has made the bill easier to understand and made it more workable. I believe we should go along with the Senate.

POINT OF INQUIRY

Mr. Smith yielded to question by Mr. Knedlik.

Mr. Knedlik: "Representative Smith, I'm interested in having you clearly indicate to me as Chairman of the Subcommittee on Capital Punishment, whether it is your understanding that the first paragraph of new section 8 is in fact simply a redaction of the existing language. The reason I'm interested in that is because at least two terms that I don't believe are defined anywhere in our state law or in the code, appear here. Particularly 'legal jeopardy' and 'heinous crime,' and I would have trouble voting for this bill unless I was confident and assured by you that you believe that this is a redaction of the existing language with regard to self-defense."

Mr. Smith: "Yes, Representative Knedlik, there is another term in the amendment that is not defined, and that is 'aggravated assault.' However, it is my understanding, and I do believe that taken as a whole, the self-defense is conditioned upon the use of reasonable means necessary to protect yourself, someone else who is under attack as indicated, or your property. I think that is consistent with our current law in RCW 9A.16.020(3)."

The motion was carried.

POINT OF PARLIAMENTARY INQUIRY

Mr. Knowles: "This bill will require sixty-six votes for passage, will it not?"

The Speaker (Mr. O'Brien presiding): "The passage of this bill requires two-thirds of the constitutionally elected members of the House of Representatives, or sixty-six votes."

2nd chance due

Death-penalty bill fails by 3 votes

By LYLE BURT
Times Olympia Bureau

OLYMPIA — Death-penalty legislation failed by three votes in the House of Representatives yesterday but may get a second chance next week.

After lengthy debate, House members turned down the proposal, 63 to 25.

Because it would amend Initiative 316, the death-penalty measure approved by the voters in 1975 and later held unconstitutional, the legislation required a two-thirds majority, or 66 votes, for passage.

Representative Will Knedlik, Kirkland Democrat, moved for immediate reconsideration of the issue. A few minutes later Representative A. J. Pardini, Spokane Republican, persuaded House members to hold the matter over until Monday.

Knedlik contended the bill is "entirely too soft," but said it represented a reasonable compromise and contained safeguards.

The measure, H.B. 815, would establish three levels of punishment for murder in the first degree.

If a person were found guilty but the jury could not agree on whether there were aggravating circumstances, the individual would be sentenced to life in prison. In this state that means 20 years, but with good behavior the person could be released in 13 years and four months.

If the jury unanimously found there were one or more aggravated circumstances but there also were mitigating circumstances, the penalty could be life imprisonment without parole.

If the jury found there were no mitigating circumstances and de-

termined the defendant was guilty "with clear certainty," the death penalty could be applied.

Representative Earl Tilly, Wenatchee Republican and sponsor of Initiative 316, said the measure was "not as tough as I would like, but I believe it is reasonable and fair."

The strongest opponent of the bill was Representative A. N. Shinpoch, Renton Democrat.

Saying he opposed the measure on philosophical grounds, Shinpoch told his colleagues death penalties are most heavily applied to the poor and to minorities.

"Those who can afford more than a little old country lawyer will be able to find mitigating circumstances," Shinpoch said.

Representative Ron Hanna, Tacoma Democrat and a probation officer, added that since 1890, a total of 3,200 persons have been executed — of which more than 2,000 were black.

Backers of the bill emphasized the safeguards.

Representative Walt Knowles, Spokane Democrat and chairman of the Judiciary Committee which did much of the drafting of the legislation, said the safeguards should relieve the concern over the possibility of an innocent person going to the gallows.

That is why the language "clear certainty" was put into the bill — because it represents a higher degree of certainty than the "beyond a reasonable doubt" used in court instructions to juries deciding other types of criminal cases, he said.

Knowles also said that nothing in the legislation would prevent a governor from exercising his or her right to pardon convicted murderers.



OFFICE OF PROGRAM RESEARCH
HOUSE OF REPRESENTATIVES
STATE OF WASHINGTON

March 29, 1977

M E M O R A N D U M

TO: DAVID D. CHEAL, Counsel, House Judiciary

FROM: TREB SCOTT, Session Attorney ^{TS}

RE: Judicial Construction of Mitigating and Aggravating
Circumstances Enumerated in Death Penalty Statutes

Pursuant to your request, I have reviewed the court decisions of certain sister states which states have several years of post-Furman experience. These states responded to Furman by enacting legislation which attempted to eliminate the arbitrariness condemned by Furman by channeling the sentencing authority's decision by focusing attention upon statutorily prescribed aggravating and mitigating circumstances. Many of the aggravating and mitigating circumstances found in the statutes of other states are the same factors embodied in HB 184, proposed SHB 1181 and HB 1336, and I shall limit this discussion to cases which have construed those factors.

For the purposes of discussion, I shall separate aggravating circumstances from mitigating circumstances, although the courts' discussions interweave the two since the nature of their task is balancing, and, in fact, a factor such as "the defendant has no significant history of prior criminal activity" can be either an aggravating or mitigating circumstance depending on the criminal history of the defendant. Henry v. State of Florida, 328 So.2d 430 (1976).

AGGRAVATING CIRCUMSTANCES

The majority of the listed aggravating circumstances can be objectively applied and do not require judicial construction to provide guidance to the sentencing authority. The most troublesome factor has been "the defendant knowingly created a great risk of death to many persons". • HB 184 § 4(6), proposed SHB 1181 § 2(1)i, HB 1336 § 2(9). Challenges have been made to the vagueness of such adjectives as "great" and "many", but the courts have found that it is enough that the language conveys to the man of ordinary intelligence the concepts involved. State of Florida v. Dixon, 283 So.2d 1 (1973).

There has been some confusion, however, in the application of this concept. In particular, the Florida Supreme Court has on several

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occasions found itself disagreeing with the trial court's application of the concept. In Tedder v. State of Florida, 322 So.2d 908 (1975) and Fontana v. State of Florida, 316 So.2d 543 (1975), the Supreme Court of Florida reversed the trial court's imposition of the death sentence. In the Tedder case, the defendant had fired in the direction of three persons, and the trial judge had determined that this behavior created a great risk to many persons. The concept was stretched to an extreme in the Fontana case, where the victim was killed in the midst of an armed robbery of a motel in which he was the clerk. The trial judge found that the defendant had created a great risk to many unknown persons insofar as the incident occurred at a public place and anyone who might have chanced upon the scene (no one else was there) would have been exposed to the danger. In each of these cases, the state's supreme court reversed the imposition of the death penalty. In neither case did the Supreme Court expressly find that the described circumstance was not "a great risk of death to many persons", but it may fairly be inferred that the appellate court did not consider that this circumstance, set in the context of the other circumstances of each case, warranted the imposition of death.

The trial court's finding of "a great risk of death" resulting from defendant's actions was reversed in Jarrell v. State of Georgia, 216 S.E.2d 258 (1975). The appellate court made no comment except that there was no evidence to support the trial court's finding. The case involved the abduction, robbery and killing of one person, and risk to others appeared as conjectural at best.

Cases in which the defendant was found to have caused "a great risk of death" have been affirmed in the following cases. In Clenault v. State of Georgia, 215 S.E.2d 223 (1975), the defendant had fired two handguns into a crowded church and caused the death of several persons. In Alvord v. State of Florida, 322 So.2d 533 (1975), the defendant had murdered three persons and the court found that he had caused the second and third deaths to rid himself of witnesses to the first murder. This the court found to be behavior causing "a great risk of death to many persons". [Under the proposed bills, other aggravating circumstances might better be invoked to include this type of incident, such as HB 184 § 4(5) or (12).]

A second aggravating circumstance the application of which has caused some confusion has been the felony-murder criteria. In Swan v. State of Florida, 322 So.2d 485 (1975) (burglary), in Tedder v. State of Florida, 322 So.2d 908 (1975) (kidnapping), and in Taylor v. State of Florida, 294 So.2d 648 (1974) (robbery), the trial court had imposed death sentences citing, among other circumstances, a finding of a felony murder, and had been reversed in each case by the appellate court. In a number of other cases involving a felony-murder, the trial court's imposition of death was upheld. Hallman v. State of Florida, 305 So.2d 180 (1974)

(robbery), Alford v. State of Florida, 307 So.2d 433 (1975) (rape), Sawyer v. State of Florida, 313 So.2d 680 (1975) (robbery). The confusion arises not from the identification of the circumstance of a felony murder, but from the weight to be given this factor. The Florida Supreme Court appears to give less weight to this aggravating circumstance than do certain of Florida's trial judges. (It may be that the Florida Supreme Court holds the view that a felony-murder is an insufficient aggravating circumstance to by itself warrant death.)

Among the aggravating circumstances included in the legislative proposals are several others which defy precise formulation, such as "the murder was committed by the defendant with the intent to interfere with, influence, disrupt or hinder the lawful exercise of any government or political function" Proposed SHB 1181 § 2(1)(e). The parameters of "political function" would have to be judicially construed to avoid disabling vagueness. I have discovered no cases construing such language.

MITIGATING CIRCUMSTANCES

The statutorily enumerated mitigating circumstances are often couched in subjective language or refer to subjective phenomenon or refer to a range of conditions (such as age or physical condition) without expressing the saliency of any point within that range. Absent limiting constructions, such criteria might not provide adequate guidelines to the sentencing authority.

The Florida Supreme Court, in State v. Dixon, 283 So.2d 1 (1973), responded to a general challenge to the vagueness of their statutory scheme and, in particular, to the criteria prescribed as mitigating circumstances. That court found that the application of the statutory criteria would provide meaningful restraints upon the sentencing authority's discretion. This case commented on the following mitigating circumstances (although without applying them to any particular set of facts):

(1) "No prior significant criminal activity." This was recognized as a quantitative factor in part and it was pointed out that the average man could differentiate between traffic offenses and armed robberies.

(2) "Extreme mental or emotional disturbance" was interpreted as less than insanity but more than the emotions of an average man, however inflamed.

(3) "The capacity of the defendant to appreciate the criminality of his conduct" was assessed in terms of degree. The defendant might still be legally answerable because his mental disturbance is not great enough to obviate his knowledge of right and wrong, yet the disturbance might interfere with that knowledge enough to call

for mitigation of the sentence.

(4) "The age of the defendant" was viewed as a variable which would most likely qualify as a mitigating circumstance at the extremes of the age range, where inexperience, on the one hand, and incompetence, on the other, might be worthy of consideration. Age was also a factor to be viewed in conjunction with the absence of prior criminal activity.

The Florida Supreme Court has on several occasions found sufficient mental or emotional disturbance on the part of the defendant to reverse the trial court's imposition of a death sentence. In Halliwel v. State of Florida, 323 So.2d 557 (1975), the defendant had killed and mutilated the body of the husband of his lover. Based on the lay testimony of the arresting police officers concerning the defendant's emotional strain, the appellate court evidently viewed the defendant's actions to have occurred "while under the influence of extreme mental or emotional disturbance." A similar result was reached in Jones v. State of Florida, 322 So.2d 615 (1976) where a review of both lay and expert testimony convinced the appellate court that the defendant was a paranoid psychotic and that although the degree of psychosis at the time of the crime remained unknown (and not enough to convince the jury that he was legally insane), it could be assumed that this mental illness contributed to the crime.

Another case where the reviewing court found enough mitigation to reverse a death sentence was Taylor v. State of Florida, 294 So.2d 648 (1974). In this case, the defendant had attempted to rob a store and wound up in a gunfight during which he was shot five times before shooting the deceased. Without explicitly referring to one of the statutory mitigating circumstances (presumably either "mental or emotional disturbance" or "capacity to appreciate criminality of conduct"), the appellate court concluded that the defendant's rationality could have been substantially impaired and lifted the death sentence.

Other mitigating factors are subject to some vagueness, such as those involving "duress or domination" or where the defendant believed he was morally justified, but no cases that I have located have provided any construction of these criteria.

The Georgia Supreme Court recently invalidated an aggravating circumstance of the defendant being a person "who has a substantial history of serious assaultive criminal convictions". Arnold v. State of Georgia, 224 S.E.2d 386 (1976). Finding the adjective "substantial" as too subjective, the Court found it unnecessary to rule on the vagueness of the adjective "serious". Although no one of the proposed bills incorporates any factor resembling the invalidated Georgia criteria, the particular word "substantial" is matched in terms of vagueness by many of the adjectives among the mitigating circumstances incorporated into the proposed bills.

MEMO to David Cheal from Treb Scott
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A Washington court would have the option of invalidating any criteria vaguely worded or of providing a limiting construction. The above-mentioned Georgia case is the one instance located where the appellate court has chosen to invalidate rather than construe the statutory criteria.

CONCLUSION

The above survey, I hope, will give you some indication of the nature of the judicial construction of the vaguely written aggravating and mitigating circumstances found in death penalty statutes which has taken place. The vast majority of reported cases appear in Florida, apparently because of their unique procedure and, perhaps, also because of the frequency of capital convictions and death sentences in that state. Time has prevented this survey from being comprehensive. I shall canvass other states upon your request.



OFFICE OF PROGRAM RESEARCH
 HOUSE OF REPRESENTATIVES
 STATE OF WASHINGTON

April 11, 1977

TO: Dave Cheal

FROM: Treb Scott, Session Counsel

SUBJECT: Judicial Consideration of "Premeditation"

I have reviewed the case law of this state as it pertains to the meaning and application of the "premeditation" required to find murder in the first degree under RCW 9A.32.030(1) and its predecessors. The newly recodified version of first degree murder appears in RCW 9A.32.030. Although the new language is structured slightly differently, the present statutory section preserves the substance of the definition of this type of first degree murder, and I believe the case law to be apposite. It should be noted however, that RCW 9A.32.020(1) provides a threshold that must be met for "premeditation" to be found:

"As used in this chapter, the premeditation required in order to support a conviction of the crime of murder in the first degree must involve more than a moment in point of time."

This is an innovation of the new criminal code and changes somewhat the case law under the former statute. The change may be only one of terminology or it may be more significant. As you predicated, there are no recorded appellate decisions under the new statutory language and consequently, the meaning of the new language is uncertain.

Challenges to first degree murder convictions, which convictions have been based on a finding of "premeditated intent", have been:

1. The correctness of the instructions given to the jury; and
2. The sufficiency of the evidence to take the issue of "premeditation" to the jury.

I. CHALLENGES TO INSTRUCTIONS

On several occasions, the instructions on "premeditation" have been found to be in error. In the earliest such case, State vs. Rutten, 13 Wash. 203 (1895), the rejected instruction commented that the formation of the intention to kill and the act itself "may be as instantaneous as successive thoughts." This, the appellate court found, was incorrect as it reduced the necessary interval between the formation of the intent and the act to such an extent that it had the effect of eliminating the difference between first and second degree murder. Premeditation and deliberation may not happen instantaneously for they mean "to weigh in the mind, to consider the reasons for and against, and consider maturely, to reflect upon." State vs. Rutten, p. 212.

Early in the century, the State Supreme Court approved an instruction which commented that "there need be no particular length of time between the formation of the intention to kill and the killing." State vs. Bridgham, 51 Wash. 19, 97 Pac. 1096 (1908). The following year, however, the court reversed a conviction because of a faulty instruction which had stated that "there need be no appreciable space of time between the formation of the intention to kill and the killing." State vs. Arata, 56 Wash. 185, 105 Pac. 227 (1909). The Arata decision made plain that deliberation or meditation is an activity which occurs over time and that while the law does not define the minimum amount of time necessary, there must be some length of time and it must be an appreciable length. Notwithstanding the apparent inconsistency between the Arata and the Bridgham decisions, the court in Arata apparently found it unnecessary to overrule its prior decision through the expedient of ignoring it.

Although it has remained undefined itself, "an appreciable period of time" continued to be instrumental as part of the standard instructions where pre-meditation was at issue. A formulation sometimes used which does not employ "appreciable period of time" appears as:

"Premeditation means thought over beforehand and describes the mental operation of thinking upon an act before doing it. Premeditation necessarily implies that some time exists between the thought process and the commission of the act itself. By this is meant that premeditation cannot occur simultaneously with the act but must precede the act. The time involved must be sufficient to allow the defendant to think over the act beforehand, but may involve no more than a moment in point of time." (Underlining added.)
State vs. Lanning, 5 Wn. App. 426, 487 P.2d 785 (1971).

The foregoing instruction is contrary to the limitation contained in RCW 9A.32.020(1) where it is specified that the premeditation required "must involve more than a moment in point of time."

II. SUFFICIENCY OF EVIDENCE

The fact of killing alone raises no presumption of premeditation or deliberation. State vs. Gaines, 144 Wash. 446, 258 Pac. 508 (1927). Oftentimes, there is no direct evidence of a premeditated intent to kill by a defendant, and, in such cases, the prosecution must argue that the sequence of events and circumstances prior to the instance of the killing gives rise to the inference that the defendant had formed the requisite intent and had sufficient time to deliberate. In a number of cases, the convicted defendants have challenged the sufficiency of the circumstantial evidence upon which premeditation had been found. The appellate courts, with a single exception, have not interfered with the juries' verdicts. Cited in support of these verdicts have been such circumstances as the defendant's motive, the defendant's prior conduct toward the victim, the defendant's preparation for the crime, and defendant having been armed, the length of time from the start of the confrontation until the moment of death, the manner of death, and sundry other circumstances.

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In State vs. Miller, 164 Wash. 441, 2 P(2d) 738 (1931), the defendant and an unknown person had in the course of a robbery of an express office shot and killed one of the office's employees. The shooting occurred almost immediately upon the entrance of the robbers into the office. The court agreed that premeditation was established by the state and in support thereof, pointed to the fact that the defendant had purchased a gun and planned the robbery, and then concluded that the defendant "may have very hastily concluded that it was advisable to dispose of Investor so that he would have but one man to contend with." In dicta, the court commented that "it is unnecessary for any appreciable period of time to elapse for premeditation", a view which appears contrary to law as it existed both before and after the case.

A case in which the defendant's testimony was instrumental in supplying the needed evidence was State vs. Horner, 21 Wn. 2d 278, 150 Pac (2d) 690 (1944). In this case, the defendant had convinced his lover to deed her property to him. There followed a scene during which his refusal to marry her angered her which in turn angered him. He then shot her. The court felt that "motive and prior conduct of a defendant is (sic) as much a part of the substantive evidence to show premeditation as is the immediate reflective deliberation which precedes the act itself." p. 281. The defendant's testimony had been:

"I turned over and thought about it and then I got mad and went crazy. I got up and got the gun and shot her."

This clinched it in the view of the court as it displayed a period of time long enough to form the deliberate intent to kill.

Several cases display the point that the defendant need not have known the victim to have had a premeditated intent of causing a death. In State vs. Collins, 50 Wn. 2d 740, 314 P 2d 660 (1957), the defendant, armed with a samurai sword, attacked a motel attendant. In the midst of this attack, the husband of the attendant walked in and was immediately killed. Prior to the appearance of the deceased and his almost instantaneous death, the defendant had never seen him. The appellate court approved the finding of premeditation and held that the required intent need not be linked to a specific person - it is sufficient if the defendant had an intent to kill any person who may be at a certain place or who may attempt to do a certain thing. A similar result was reached in State vs. Ross, 56 Wn. 2d 344, 353 Pac (2d) 885 (1960), where the defendant had shot an unknown person in a hallway. The prosecution had argued that the defendant had intended to kill one person and had mistakenly slain a stranger. The Supreme Court stated that the jury could have believed the prosecution's theory or it could have found that the defendant was not confused about the identity of the victim and that during the several minutes between the first meeting of the two men and the shooting, there was a sufficient period during which the defendant could form an intent and reflect upon it. In either case, premeditation existed.

In other cases, the manner of death has given rise to the inference of premeditation. It has been held that an appreciable period of time can be found within the span of a sustained attack. In State vs. Harris, 62 Wn. 2d 858, 385 P.(2d) 18 (1963), the victim was beaten about the skull and then strangled. The court concluded that the jury could have found that an appreciable period of time had elapsed between the first blow and the choking and that an intent had been formed during this period. A similar view was taken in State vs. Gaines, 144

Wash. 446, 258 Pac. 508 (1927), where the victim was first choked into insensibility and then the defendant traveled to a nearby dump, fetched a rock, returned to the still insensible victim and struck the fatal blow.

The court has shown a tendency to preserve the juries' verdict as long as there exists a sequence of events such that some time had elapsed between the formation of the intent and the act which could possibly be the interval during which premeditation could occur. In State vs. Lanning, 5 Wn. App. 426, 487 P.(2d) 785 (1971), the victim's body, with the throat torn or cut, was found alongside a logging road about 25 feet from the defendant's abandoned car. The evidence tended to show that the defendant was jealous on account of the victim's behavior with other men. The court believed that the jury could have found that the defendant formed the intent to kill the victim while driving up the logging road, or at some point between the car and the spot 25 feet away. Premeditation was also indicated by the availability of the knife-edged lethal instrument used.

The most extreme example of the policy of the court in not interfering with the jury's verdict is found in State vs. White, 60 Wn. 2d 551, 374 P.(2d) 942 (1962). In this case, once again, premeditation was inferred from the circumstances. The defendant had attacked with his fists a woman in the laundry room of a housing project. There was no evidence of any prior relationship or acquaintance between the defendant and the victim, or, in fact, that he had ever seen her until moments before the act. The attack was sudden, brutal, quickly consummated, apparently motiveless and irrational. The court, with very little comment, recalled that a moment in time is sufficient for premeditation to occur and concluded that the evidence was sufficient to take the issue to the jury.

State vs. Luoma, 14 Wn. App. 705, 544 P.(2d) 770 (1976) is the sole case where the appellate court has reversed the jury's decision. In that case, the victim was a five-year old girl found in a culvert with a rock on top of her head. Circumstantial evidence was sufficient to place the victim in the defendant's car heading in the direction of the culvert. In addition, exculpatory testimony given by the defendant was impeached. The court of appeals, finding inadequate evidence of premeditation, reversed the first degree murder conviction.

"The circumstances attendant this crime, i.e., exactly how and where and why the death blows were administered, are totally unknown. Moreover, the State failed to introduce any evidence of motive or planning. Thus, there were no facts from which the jury could have properly inferred that this was a premeditated act." p. 714

III. CONCLUSION

It has been impossible for the courts to fashion any objective test to offer juries in their search for premeditation. It has been generally understood that the "premeditated intent" to effect the death of a person must precede the act of killing sufficiently to allow for the premeditation or deliberation which marks the difference between first and second degree murder. The amount of time which is sufficient has often been characterized as "appreciable" or "but only a moment", but is now statutorily defined as "more than a moment in point of time."

Because of the usually unknown nature of the defendant's contemplation prior to the killing, the courts have allowed juries considerable freedom to infer from

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circumstances which exhibit sufficient time for premeditation to have taken place that such premeditation did in fact occur.

The new statutory limitation will likely put a heavier burden upon the state to prove premeditation. The enactment of the new law, although not controlling in the Luoma case, may have influenced the court's consideration of the issue there. It is possible that in the future, the courts will require a greater showing by the state to make a prima facie case of premeditated first degree murder and/or the courts will not continue to display reluctance to interfere with a jury's verdict.

It would probably be helpful to obtain the instructions that have been used under RCW 9A.32.020.

RS:bt

ESHB 615

SPONSORS: Committee on Judiciary
(Originally sponsored by Representatives Enbody, Knowles
and McKibbin)

COMMITTEE: Judiciary

Enacting the "comprehensive sentencing act of 1977".

ANALYSIS AS OF MAY 10, 1977

ISSUE:

In November 1975 Initiative 316, enacting a death penalty for aggravated murder in the first degree, was adopted by the voters. Since then there have been a number of United States Supreme Court rulings on state death penalty statutes which have articulated the essential elements of a constitutional death penalty statute. The court has stated that a death penalty statute must allow the sentencing body, in determining the penalty, to focus on two essential criteria: (1) the circumstances of the offense; and (2) the individual, with room for discretion, and the exercise of mercy and mitigation.

The State Attorney General in a formal opinion has expressed his view that the death penalty statute adopted by the voters in 1975 is substantially similar to the type of death penalty found unconstitutional by the U. S. Supreme Court and would, if challenged in the courts, be held likewise unconstitutional. Such a challenge is currently on appeal to the state supreme court from a superior court determination that Washington's law could be enforced.

SUMMARY:

The bill amends the existing death penalty statutes for the purpose of conforming them to the dictates of the 1976 U. S. Supreme Court opinions.

The bill redefines the crime of aggravated murder in the first degree and provides a two-step sentencing procedure for determining whether the death penalty or life imprisonment without possibility of parole or release should be imposed.

Definition of aggravated murder in the first degree

The crime of aggravated murder in the first degree is committed if the defendant:

(1)

- (a) Commits murder in the first degree with premeditation (RCW 9A.32.020 (1) (a));
 - (b) The crime is committed in any one of 10 aggravating circumstances; and
 - (c) There are none of 7 mitigating circumstances sufficiently substantial to call for leniency; or
- (2)
- (a) Commits murder in the first degree with premeditation or without premeditation but under circumstances manifesting an extreme indifference to human life (RCW 9A.32.030 (1) (a) or (b));
 - (b) The crime is committed in the course of or in furtherance of, or in immediate flight from the crime of:
 - (1) robbery 1 or 1
 - (2) rape 1 or 2
 - (3) burglarly 1
 - (4) arson 1
 - (5) kidnapping for ransom or to obtain a shield or hostage; and
 - (c) There are none of 7 mitigating circumstances sufficiently substantial to call for leniency.

Findings of the jury at guilt phase

The jury in determining whether the defendant is guilty of aggravated murder in the first degree must make a special finding on the aggravating and mitigating circumstances:

- (1) If there is a unanimous finding of one or more aggravating circumstance and a unanimous finding that there are no mitigating circumstances sufficient to call for leniency, a separate sentencing hearing is scheduled.
- (2) If there is a unanimous finding of one or more aggravating circumstance and a finding of one or more mitigating circumstance sufficient to call for leniency or the jury is deadlocked on the issue, the defendant is sentenced to life imprisonment without possibility of parole or release.
- (3) If there is no unanimous finding of one or more aggravating circumstance or the jury is deadlocked on the issue, the defendant is sentenced to life imprisonment as for the crime of murder 1.

Death penalty hearing

The determination of whether the death penalty should be imposed is made by the jury which determined guilt following a special hearing conducted after the guilty verdict or plea of guilty has been entered. Relevant hearsay can be presented as long as the defendant has an opportunity to rebut any hearsay statements.

The jury must return special findings on the following issues which must be established beyond a reasonable doubt:

- (1) That the evidence at trial established the guilt of the defendant with clear certainty;
- (2) That there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

If a negative finding on either issue is returned, the defendant is sentenced to life imprisonment without possibility of parole or release.

Appellate review

An automatic review by the Supreme Court is required whenever the death penalty is imposed. Briefs and oral arguments will be allowed.

The court, in addition to considering any normal errors specified in the appeal, shall determine:

- (1) Whether the evidence supports the jury's findings on the penalty;
- (2) Whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, making specific reference to those cases.



OFFICE OF PROGRAM RESEARCH
HOUSE OF REPRESENTATIVES
STATE OF WASHINGTON
May 17, 1977

MEMORANDUM

TO: Representative Rick Smith

FROM: David D. Cheal, Counsel
House Judiciary Committee

RE: Proposed Senate Amendment to SHB 615

Pursuant to your request, I have reviewed the proposed Senate amendment to Substitute House Bill 615, and as a result, offer the following discussion of apparent technical problems and policy changes which appear in the proposed amendment.

(1) A different kind of sentencing hearing.

The biggest single difference in the amendment is that the determination of the existence of mitigating or aggravating circumstances is made during the sentencing proceeding rather than at the trial. This has two possible effects:

- (a) The rules of evidence are somewhat relaxed during the sentencing proceeding as opposed to trial and a wider variety of evidence would be admissible. Presumably, this would aid the prosecution in proving the existence of certain aggravating circumstances, and might aid the defendant in proving mitigating circumstances. All in all, this doesn't seem to be an exceptionally drastic change.
- (b) Of greater significance would be the change in status of the two questions formerly put to the jury separately in the sentencing hearing, namely, is the defendant likely to commit future violent acts, and did the evidence establish guilt with clear certainty. These questions are now listed as two of nine mitigating circumstances rather than separate questions which the jury must answer. The significance of this change lies in the preamble to the list of mitigating circumstances which reads "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:"

My analysis is that under the proposed amendment, the jury

could find that the defendant is not likely to commit future violent acts, but still could impose the death penalty because that mitigating factor was not "sufficient to merit leniency." Under the bill as it passed the House, on the other hand, the same finding by the jury would preclude imposition of the death sentence.* This is a drastic policy change, in that the bill becomes essentially a Georgia-type statute, (effectively identical to HB 1336, which the death penalty subcommittee rejected) except that the mitigating circumstances are somewhat expanded, rather than the unique approach of Substitute House Bill 615.

(2) Possible new jury for sentencing hearing.

Page 2, lines 1-6, and lines 23-26, provide for the possibility of a special jury to sit at the sentencing hearing that did not sit at the trial. This presents a problem with regard to the final two mitigating circumstances, in that those mitigating circumstances assume a familiarity with the evidence to the extent that the jury can make a prediction about the future conduct of the defendant based on that evidence, and, more important, the jury is required to make a judgment as to the quantum of proof provided by the evidence introduced at trial. This would be very difficult if the sentencing jury was a different group than that which was impaneled for the trial. Substitute House Bill 615 assumes (a) that the jury cannot be waived at the trial, and (b) that the same jury must continue during the sentencing proceeding. In the event that some juror or perhaps even more than one juror were unable to continue due to illness or some other such cause, the criminal rules provide for alternatives.

(3) Instruction to jury on the nature of penalty.

Missing from the proposed amendment is section 4 of SHB 615, which requires the jury to be informed of the potential sentences that may flow from their deliberations. Prospective jurors are required to state under oath that the nature of the penalty would not affect their fact determinations. Any juror unable to make such a statement, would be automatically disqualified. This section represents a policy determination that jurors should be required to face this issue and that making a statement under oath will have a positive effect on their ability to reach a fair verdict. It seems that it might also afford both the prosecution and the defense a chance to make an evaluation of jurors for challenge purposes that they would not otherwise be able to make. It, of course, is not apparent whether the omission of this section is intentional or inadvertent, but its absence does seem significant.

* The same analysis applies to the question of whether the evidence established guilt with clear certainty.



OFFICE OF PROGRAM RESEARCH
HOUSE OF REPRESENTATIVES
STATE OF WASHINGTON
May 23, 1977

M E M O R A N D U M

TO: Representative Rick Smith

FROM: David D. Cheal, Counsel *DDC*
House Judiciary Committee

RE: Constitutional issue presented by SHB 615 as
it was reported out of the Senate Judiciary
Committee

As you requested, I have analyzed the following issue:

Does the inclusion of the determination of the existence of aggravating and mitigating circumstances in the trial (as opposed to the sentencing proceeding) require or allow introduction of irrelevant and prejudicial evidence contrary to the guidelines and rules set forth in Gregg v. Georgia?

CONCLUSION:

This question is not answerable from an analysis of Gregg. There is certainly more than a slight possibility that this feature would not meet the due process and equal protection guidelines in Gregg.

ANALYSIS:

The Supreme Court in Gregg approved a bifurcated proceeding which separated the guilt determination from the determination of the proper sentence. This approval was based on the underlying assumptions that:

- (a) jury sentencing in capital cases is desirable to maintain a link between contemporary evolving community standards and the penal system. This may be true with regard to all criminal sentences but particularly true when such a unique penalty as capital punishment is involved; Gregg, 96 S.Ct at 2932.
- (b) for this jury determination to be meaningful, the jury must be allowed some discretion;

(c) but in so grave a matter that discretion must be suitably guided so as to minimize the risk of arbitrary and capricious imposition of the death penalty that was condemned in Furman;

(d) suitable discretion and guidance requires that the jury be fully informed as to the "circumstances of the offense together with the character and propensities of the offender." Gregg, 96 S.Ct. at 2932, quoting Pennsylvania v. Aske, 302 U.S. 51, 55 (1937).

The problem of providing the jury with all the information they need to avoid arbitrary decisions regarding the death sentence is that some of that information would be irrelevant and prejudicial to the determination of guilt. The court then cited with approval certain comments by the drafters of the Model Penal Code which recommend a determination of guilt in a proceeding governed strictly by the rules of evidence, which of course, would rule out evidence which is irrelevant or prejudicial, but once guilt is established opening up a second proceeding that could consider all material relevant to issue of sentencing.

The Court cautioned that each statutory scheme must be evaluated individually, and that they were not suggesting that the Georgia or Model Penal Code procedure were the only permissible types of statutes.

Now to apply the above to SHB 615. The bill does of course provide a bifurcated system of guilt determination followed, in appropriate cases by a sentencing proceeding. However, the determination of guilt requires a determination of the existence of aggravating and/or mitigating circumstances, since the crime of aggravated murder in the 1st degree is defined in Section 2 as 1st degree murder accompanied by one or more of the statutory aggravating circumstances and in the absence of any mitigating circumstances.

Presumably, although it is not expressly discussed, the Court's discussion of determination of guilt refers to a determination of whether the defendant committed the act of 1st degree murder or other capital crime. That determination would not require introduction of prejudicial evidence. Somewhat analagous to SHB 615 is the Texas statute which sets forth a definition of capital murder, which is murder in the 1st degree accompanied by one or more of a list of aggravating circumstances set forth in the statute. The Texas statute, however, does not require absence of any mitigating circumstance as a condition to proving the offense charged. Under the Texas statute, then, the jury

considers at the guilt determination stage whether the defendant committed the act that caused the death, whether that act constitutes 1st degree murder, and whether it was accompanied by any of the listed aggravating circumstances. Although this is a rather complicated determination and only on the surface somewhat less complicated than that envisioned by SHB 615, it does seem to have one striking difference: the three determinations just mentioned are all relatively factual determinations based on the evidence that would be relevant to the death in question. They do not call for an evaluation of the "...character and propensities of the offender." Gregg at 2932.

It seems likely although it is not expressly discussed in the opinion, that the type of irrelevant and prejudicial evidence that the Supreme Court said should be kept out of the guilt determination phase of the death penalty trial is the kind of evidence that would have to be introduced in order for the jury to consider mitigating circumstances.

Some of the mitigating circumstances listed in SHB 615 seem to be not irrelevant. For example, number 4, regarding whether the defendant's participation in the homicidal act was relatively minor. Also number 5, which asks whether the defendant acted under duress or domination of another person. Evidence on these issues might be introduced to negate elements of 1st degree murder. However, number 1, the defendant's prior criminal record would seem to be prejudicial. Although in certain criminal trials I believe this evidence can be introduced, particularly if the defendant takes the stand and testifies as to his innocence, that requirement would not be present here and his prior criminal history could be brought to the juries' attention. Number 6 and 7, the Durham rule, and the age of the defendant would be irrelevant under current Washington law, but I don't believe prejudicial. In summary, the only mitigating circumstance that would appear to be possibly both irrelevant and prejudicial would be number 1, relating to prior criminal history. Whether this is enough to put the statute out of bounds under Gregg seems to me to be very speculative. However, it would mean that in cases where aggravated murder is charged, the defendant's prior criminal history would be admissible and in 1st degree murder cases, presumably a somewhat less serious crime, the evidence of prior criminal history could often not be introduced. This might well present a fatal equal protection problem.

Another analysis might go as follows: evidence in mitigation is not limited to the mitigating circumstances listed in the statute. It could and should be far ranging evidence, much of which would often be evidence regarding the defendant's

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character. This would then make evidence tending to derogate the defendant's character admissible. This might be unduly prejudicial. It is a different predicament than the usual criminal trial because under SHB 615 the defendant is required (in many cases) to introduce all possible mitigating evidence due to the statutorily defined elements of the crime.

Certainly the safe route would be to place the consideration of mitigating circumstances in the sentencing proceeding, which would make this bill nearly identical to the Texas statute which, of course, has been approved.

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From: Christina Albouras [mailto:calbouras@hotmail.com]
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To: OFFICE RECEPTIONIST, CLERK
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Subject: State v. Monfort, No. 88522-2
Importance: High

May 13, 2013

Dear Clerk, Ms. Dwyer & Ms. Summers:

Attached for filing in *State of Washington v. Christopher John Monfort*, No. 88522-2, is Monfort's Response to State's Opening Brief and Opening Brief on Issue on Cross-Appeal and Second Supplemental Appendix. Please contact me with any questions or concerns.

Ms. Dwyer and Ms. Summers, please contact me as soon as possible if you would like a hardcopy mailed to you as well.

Thank you for your kind attention.

Sincerely,
Christina Alburas
Certified Paralegal
(206) 538-5301
* * * *

Law Office of Suzanne Lee Elliott
Suite 1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
Fax (206) 623-2186

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