IN THE SUPREME COURT OF THE STATE OF NEVADA



DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 77424

# RESPONDENT'S APPENDIX

**Volume 3**

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 1st day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ J. Garcia*
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DAVID JAMES BURNS, aka
D-SHOT,
#2757610

Defendant.

CASE NO: C-10-267882-2

DEPT NO: XX

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444

DATE OF HEARING: 9/5/13
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Strike The State's Notice Of Intent To Seek The Death Penalty Based On The Cost Of Capital Punishment And Attendant Policy Considerations, Or In The Alternative, Motion To

Stay Capital Proceedings Pending The Outcome Of The Audit Related To Assembly Bill 444.

This opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

## POINTS AND AUTHORITIES

## ARGUMENT

### I. THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY IS VALID AND SHOULD NOT BE STRICKEN

Defendant moves to strike the State's Notice of Intent to Seek the Death Penalty ("Notice"). Defendant argues that the Notice should be stricken because the procedural safeguards mandated by Nevada's death penalty scheme are not viable in the modern economic climate. Defendant's Motion ("DM") 17. Defendant's Motion is without merit as he fails to assert any cognizable grounds for striking a Notice. As such, this Court should deny Defendant's Motion.

The Nevada Supreme Court has outlined the course that Capital Cases should follow. With specific reference to the procedure surrounding the Notice, Supreme Court Rule ("SCR") 250(4)(c) states:

> "No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance."

The Court has noted that its purpose in promulgating SCR 250(4)(c) was to "ensure that defendants in capital cases receive notice sufficient to meet due process requirements." State v. Dist. Court (Marshall), 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000). Generally, the Court has only held Notices invalid where Notices are facially at variance with SCR 250(4)(c). See e.g. Redeker v. Dist. Court, 122 Nev. 164, 168, 127 P.3d 520, 523 (2006).

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The Court's interpretation of SCR 250(4)(c) has strictly tracked the Rule's language. The Rule itself begins with a time limitation: "[n]o later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty." SCR 250(4)(c). In Marshall, the Court confirmed the clear meaning and validity of the timeliness provision when it held that a district court judge had not abused his discretion by striking the State's Notice on timeliness grounds, 116 Nev. at 965, 11 P.3d at 1216. The Court further noted that striking an untimely Notice is warranted unless the State shows good cause to file an amended or late Notice per SCR 250(4)(d). Id.

SCR 250(4)(d) allows a district court to permit the State to file an untimely or amended Notice "[u]pon a showing of good cause . . . ." In Marshall, the Court set the extreme limits of good cause and noted that a finding of good cause "rested within the district court's sound discretion." Bennett v. Dist. Court, 121 Nev. 802, 810-11, 121 P.3d 605, 611 (2005) (citing Marshall. 116 Nev. at 965, 11 P.3d at 1216). Thus, the Court has required strict adherence to SCR 250(4)(c) with regard to the timeliness of Notices, and a Notice at variance with the Rule, absent a finding of good cause, provides firm grounds for a motion to strike. However, so long as the Notice facially complies with the timing language of SCR 250(4)(c), it will not be stricken on timing grounds. Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

There are further grounds to support the striking of all or part of a Notice where the Notice fails with regard to the alleging of aggravating circumstances. In relevant part, SCR 250(4)(c) states, "[t]he notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." As a preliminary matter, the Court has held that the aggravating circumstances alleged in the Notice must actually be aggravating circumstances recognized and defined in NRS 200.033. Hidalgo v. Dist. Court, 124 Nev. 330, 337, 184 P.3d 369, 374 (2008). In Hidalgo, the Court ordered two aggravating circumstances listed in the State's Notice to be stricken because they were deficient as they were not aggravating circumstances per NRS 200.033. Id.

Beyond that, the Court has also required strict adherence to the specificity language of SCR 250(4)(c). In Redeker, the Court held that a Notice is facially insufficient where it fails to allege with specificity facts that would prove the alleged aggravating circumstances, 122 Nev. at 168, 127 P.3d at 523. The Court held that pursuant to SCR 250(4)(c), "the specific supporting facts are to be stated directly in the notice itself." Id. at 169, 127 P.3d at 523. In addition to the mere recitation of the requisite facts, the Notice must present a coherent and clear statement of facts to support the aggravators. Hidalgo, 124 Nev. at 338-39, 184 P.3d at 375-76 (noting the insufficiency of the confusing language used in the notice). In Hidalgo, the Court found grounds for striking the State's Notice where, "the principal problem with the notice of intent . . . [was] not the lack of factual detail." Id. at 339, 184 P.3d at 376. Instead, the Court held that the Notice should be stricken because the State presented its factual support "in an incomprehensible format such that it fail[ed] to meet the due process requirements of SCR 250(4)(c)." Id.

The degree to which the Court's interpretation of SCR 250(4)(c) tracks the rule's plain language is not surprising. SCR 250 is a "valid product of [the Court's] inherent authority to regulate procedure in criminal cases." Marshall, 116 Nev. at 968, 11 P.3d at 1218. As such, the grounds required to strike a Notice are found, as the Court's decisions reveal, where the Notice fails to comply with the language of SCR 250(4)(c) on its face. See e.g. Redeker, 122 Nev. at 168, 127 P.3d at 523; Marshall, 116 Nev. at 965, 11 P.3d at 1216.

Here, Defendant does not base his Motion on any grounds that have been held to be sufficient to strike a Notice. Further, Defendant does not cite any relevant authority that should compel this Court to grant his motion. Defendant does not suggest that the State's Notice is deficient due to a lack of specificity, that it is untimely, that it is incomprehensible in any way that would undermine the due process motivations of SCR 250(4)(c), or indeed even reference any particular aspect of the State's Notice whatsoever.

The reason for Defendant's failure to allege any specific deficiencies with the State's Notice seems clear: there are none. In the instant case, the State's Notice was filed timely on October 28, 2010, 15 days after Defendant was indicted. The Notice lists the aggravating

circumstances that the State intends to prove and cites to the relevant portions of NRS 200.033 where those circumstances are defined. The Notice also supports the aggravating circumstances with a specific, coherent, and comprehensible recitation of the relevant facts on which the allegations of aggravating circumstances are based.

In short, Defendant has not alleged any cognizable grounds to support his Motion to Strike. Defendant's sole cited basis for his Motion to Strike is the cost of capital punishment and attendant policy concerns. Such a ground has not been recognized as a legitimate basis for invalidating a Notice and is contrary to the Nevada Supreme Court's precedent regarding the interpretation of SCR 250(4)(c). Because Defendant fails to cite any relevant authority, allege any cognizable ground for relief, or even specifically address the Notice at issue, his Motion is frivolous and warrants no serious consideration by this Court and should be denied.

## II. DEFENDANT PROVIDES NEITHER LEGAL JUSTIFICATION NOR SUFFICIENT REASON TO STAY PROCEEDINGS

Defendant moves, in the alternative to his Motion to Strike, for this Court to issue a "stay of capital proceedings" until the completion of the legislative audit mandated by Assembly Bill ("AB") 444 . Defendant argues that a stay should be granted because "[t]he outcome of this audit may well reflect that the costs of [the] death penalty can not be justified by the meager results." DM 17. Defendant's Motion should be denied as he fails to cite any relevant authority to support his extraordinary request for a stay of a criminal trial. Further, Defendant asks this Court to interject itself into the purview of the Legislature and issue a stay that is contrary to the expressed prerogatives of the Nevada Supreme Court.

In general, courts have a limited ability to stay proceedings. Adler v. State, 93 Nev. 521, 522, 569 P.2d 403, 404 (1977). Defendant provides no statutory, procedural, or case authority that would permit a stay of the proceedings pending the outcome of a legislative audit. The Legislature has outlined a comprehensive framework for the issuance of stays in Capital Cases. See e.g., NRS 176.486 (granting district courts the authority to stay execution of a death sentence when a post-conviction habeas petition has been filed); NRS 176.487

(outlining the criteria that the district court should use in determining whether or to issue a stay of execution pursuant to a post-conviction habeas petition). The Nevada Rules of Appellate Procedure also provide significant guidance on the subject of stays. See NRAP 8(a) (authorizing a motion for a stay of proceedings in district court pursuant to an appeal). However, the distinction between these mechanisms and the instant case is that Defendant has neither been convicted nor sentenced. He is not pursuing an appeal from a judgment of conviction or the denial of a Petition. Rather, in effect, Defendant is asking this Court for an indefinite continuance.

The District Court, of course, does have discretion to grant a continuance as long as the requesting party has shown good cause to request one based on the totality of the circumstances. State v. Nelson, 118 Nev. 399, 46 P.3d 1232 (2002). However, here, Defendant asserts no good cause to request a continuance—and indeed did not actually request one. Rather, he merely asserts that this Court should grant his Motion because the Legislature may or may not alter or abolish capital punishment in this State based on the results of an audit that may or may not show any dispositive findings. If for no other reason than that Defendant has neither been convicted nor sentenced, this Motion is frivolous and exceedingly premature. Defendant is essentially asking this Court to issue a moratorium on all Capital Cases. No fair interpretation of the notion of good cause could find that asking the District Court to intrude into the Legislative spectrum on the basis of unfounded speculation on the possible future actions of the Legislature meets that reasonable standard.

Defendant relies on the passage of AB 444 to support his Motion. He references several statements from concerned people who addressed the Legislature on various subjects at the hearings and meetings pertaining to AB 444. DM 5-6. In the first place, Defendant's argument, which notes the passage of a bill designed to study the fiscal costs of Capital proceedings while at the same asking for an indefinite cessation of those proceedings, is a contradiction unto itself. Beyond that, however, the language of the Bill itself makes no statement regarding any potential changes or actions that the Legislature might take after the audit is performed. 2013 Nevada Laws Ch. 469 (A.B. 444). The stated purpose of the bill is

to study and assess the fiscal costs of the death penalty in Nevada. Id. The limited scope of the Bill was addressed in committee. NV Assem. Comm. Min., 5/9/2013, Nevada Assembly Committee Minutes, 5/9/2013 (statement of Chair Ohrenschall)) ("The bill is crafted to be dispassionate. It is neither for nor against the death penalty." Nowhere in the plain language of AB 444 or in its Legislative history is there any support for Defendant's Motion to Stay Capital Proceedings.

Finally, at the outset of its Rule regulating the procedure of Capital Cases, the Nevada Supreme Court states:

> "The purposes of this rule are: to ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and *expeditious final disposition* of all capital cases." SCR 250(1) (emphasis added).

Bearing in mind the Nevada Supreme Court's stated desire to ensure fair and expedient resolution of Capital Cases, as well as the State's legitimate interest in the swift and effective administration of justice, and the Defendant's and all Defendants' Constitutional rights to a speedy trial, Defendant's Motion to Stay Capital Proceedings is an extraordinary request.

Defendant's Motion, devoid of any good cause, relevant authority, or statutory guidance, is merely a disguised attempt to have this Court issue a moratorium. Defendant has attached twenty-eight exhibits to his Motion. The vast majority of those exhibits pertain to examples of State Legislatures across the United States exercising their inherent power to regulate, define, and administer crime and punishment within their borders, see e.g. Patterson v. New York, 432 U.S. 197, 201-02, 97 S. Ct. 2319, 2322 (1977). The Legislature has shown by its passage of AB 444 that it is more than capable of enacting legislation in this area. Had it desired to issue a moratorium, then it could have very easily done so in the legislation. Absent this Legislative directive, Defendant's Motion is not supported by AB 444 and should be denied.

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## CONCLUSION

Defendant's Motion to Strike the State's Notice of Intent to Seek the Death Penalty does not assert any cognizable ground to strike a Notice. Furthermore, Defendant's Motion, in the alternative, for a Stay of Capital Proceedings asks this Court to grant extraordinary relief without citing any relevant authority or asserting any good cause. Based on the foregoing arguments, the State respectfully asks that Defendant's Motions be denied.

DATED this 25th day of July, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Marc Digiacomo
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION AND/OR ELECTRONIC MAIL

I hereby certify that service of State's Opposition to Defendant's Motion To Strike The State's Notice Of Intent To Seek The Death Penalty Based On The Cost Of Capital Punishment And Attendant Policy Considerations, Or In The Alternative, Motion To Stay Capital Proceedings Pending The Outcome Of The Audit Related To Assembly Bill 444, was made this 25th day of July, 2013, by facsimile transmission and/or e-mail to:

ANTHONY SGRO, ESQ.
tsgro@pattisgrolewis.com
FAX #386-2737

CHRISTOPHER R. ORAM, ESQ.
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FAX #974-0623

BY: /s/ J. Robertson
J. Robertson
Employee of the District Attorney's Office

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Attorneys for Defendant

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>vs.<br>DAVID BURNS,<br>#2757610<br>Defendant | CASE NO. C267882-2<br>DEPT. XX |

**REPLY TO STATE'S OPPOSITION TO MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444**

COMES NOW, the Defendant, DAVID BURNS, by and through ANTHONY P. SGRO, ESQ., of PATTI, SGRO & LEWIS, and CHRISTOPHER R. ORAM, ESQ., and files his Reply to the State's Motion to Strike the State's Notice of Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant Policy Considerations or in the Alternative Motion to

Stay Proceedings Pending the Outcome of the Audit Related to Assembly Bill 444.

This Reply is made and based on the following points and authorities and any oral argument at the time set for hearing on the Motion.

DATED this 26th day of August, 2013.

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
720 S. 7th Street, Suite 300
Las Vegas, NV 89101
Attorneys for Defendant

**POINTS AND AUTHORITIES**

In its Opposition, the State argues that the Defendant is precluded from requesting that this Court strike the State's Notice of Intent to Seek the Death penalty, as the grounds for the motion have not been previously recognized by the Nevada Supreme Court. However, the State's specious assertion is undermined by the fact that the Defendant requests the instant relief based upon the recent enactment of a death penalty audit by the Nevada State Legislature. As the Act creating the audit was passed on June 10th, 2013, less than two (2) months prior to the State's Opposition, it is highly unlikely that the Supreme Court would have had opportunity to rule on the instant issues within such a short time frame.

As to the numerous public policy considerations, sociological factors, and issues of judicial economy cited by the Defendant in his Motion, the State has failed to address any of these factors, or the fiscal impact of the death penalty on the State of Nevada.

Given the trend in similar jurisdictions towards abolishing the death penalty, in tandem with the Legislature's interest in assessing the costs of the death penalty, the Defendant is simply requesting that he, the Court, and the State of Nevada be spared the expense of a lengthy capital

proceeding that may be subsequently invalidated by the future abolishment of the death penalty in Nevada. As such, Defendant requests that this Court strike the Notice of Intent to Seek the Death Penalty, or in the alternative, stay capital proceedings pending the outcome of the audit.

## CONCLUSION

For above reasons, the Defendant respectfully requests that this Court strike the Notice of Intent to Seek the Death Penalty against Defendant Burns. In the alternative Mr. Burns requests that the capital proceedings against him be stayed until the resolution of the audit prescribed in Assembly Bill 444.

DATED this 26th day of August, 2013.

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
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Las Vegas, NV 89101

Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26 day of August, 2013, I served a true and correct copy of the foregoing document entitled: REPLY TO STATE'S OPPOSITION TO MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444 as indicated below:

_____ sending a copy via facsimile to the parties herein, as follows; and/or

___✓___ sending a copy via electronic mail, and/or

_____ placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as follows:

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**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

v.

DAVID BURNS,
#2757610

Defendant.

CASE NO. C267882-2

DEPT. XX

**SUPPLEMENTAL EXHIBITS (#29-50) IN SUPPORT TO MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444**

COMES NOW, the Defendant, DAVID BURNS, by and through his attorneys of record, ANTHONY P. SGRO, ESQ., of PATTI, SGRO, LEWIS & ROGER, and CHRISTOPHER ORAM, ESQ., and files his Supplemental Exhibits to Motion to Strike the State's Notice of

Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant Policy Considerations or in the Alternative Motion to Stay Proceedings Pending the Outcome of the Audit Related to Assembly Bill 444.

Attached to this document are supplemental exhibits to the instant motion that will be incorporated into a PowerPoint presentation at the time set for hearing on the matter.

DATED this 11 day of September, 2013.

PATTI, SGRO, LEWIS & ROGER

ANTHONY P. SGRO, ESQ.
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Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 11th day of September 2013, I served a true and correct copy of the foregoing document entitled: SUPPLEMENTAL EXHIBITS IN SUPPORT OF MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444 as indicated below:

_____ sending a copy via facsimile to the parties herein, as follows; and/or

_✓_ sending a copy via electronic mail, and/or

_____ placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as follows:

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An employee of Patti, Sgro, Lewis & Roger

# EXHIBIT 29

DP DEATH PENALTY
IC INFORMATION CENTER

Fact Sheet
Upcoming Executions
Execution Database
State-by-State
Podcasts
Mobile

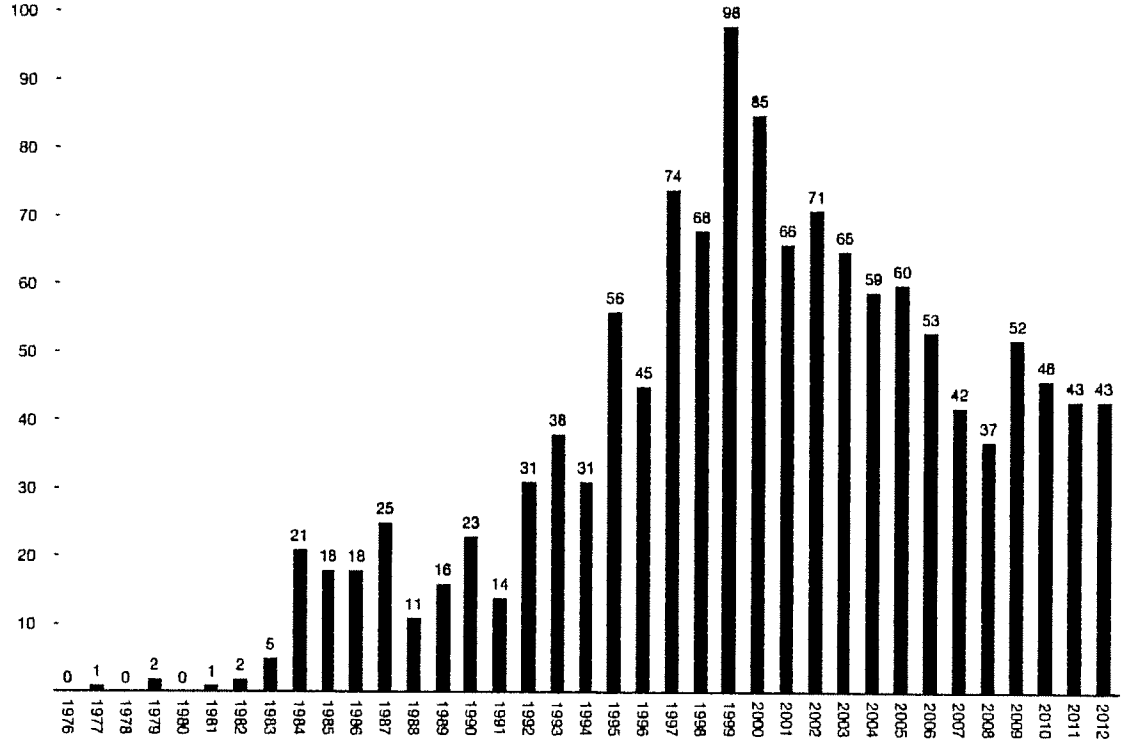


**Executions by Year**

Last updated August 6, 2013 following an execution in Florida

**Total since 1976 (including 2013):** 1343
**Executions in 2013:** 23
**Executions in 2012:** 43
**Executions in 2011:** 43

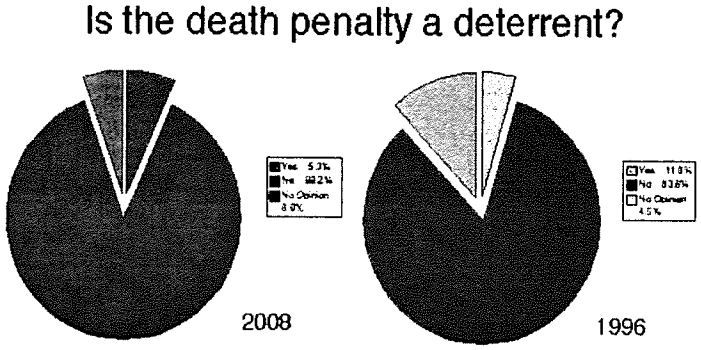
## Executions by Year Since 1976



# EXHIBIT 30

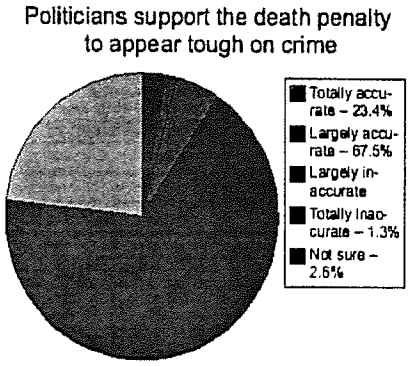
**Study: 88% of criminologists do not believe the death penalty is an effective deterrent**

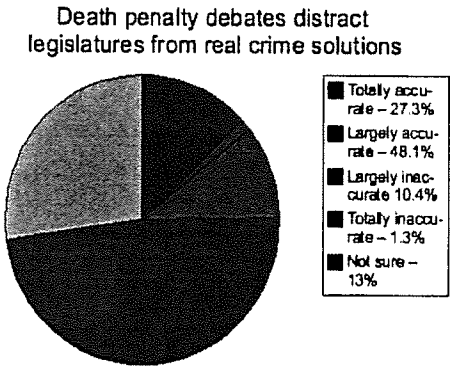
A recent study by Professor Michael Radelet and Traci Lacock of the University of Colorado found that 88% of the nation's leading criminologists do not believe the death penalty is an effective deterrent to crime. The study, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists* (http://www.deathpenaltyinfo.org/files/DeterrenceStudy2009.pdf), published in the *Journal of Criminal Law and Criminology*, concluded, "There is overwhelming consensus among America's top criminologists that the empirical research conducted on the deterrence question fails to support the threat or use of the death penalty." A previous study in 1996 had come to similar conclusions.




The criminologists surveyed included - 1) Fellows in the American Society of Criminology (ASC), (2) Winners of the ASC's Sutherland Award, the highest award given by that organization for contributions to criminological theory, or (3) Presidents of the ASC between 1997 and the present. Those presidents before 1997 had been included in the prior survey. Respondents were asked to base their answers on existing empirical research, not their views on capital punishment.

Nearly 78% of those surveyed said that having the death penalty in a state does not lower the murder rate. In addition, 91% of respondents said politicians support the death penalty in order to appear tough on crime – and 75% said that it distracts legislatures on the state and national level from focusing on real solutions to crime problems. Over all, 94% agreed that there was little emperical evidence to support the deterrent effect of the death penalty. And 90% said the death penalty had little effect overall on the committing of murder. Additionally, 91.6% said that increasing the frequency of executions would not add a deterrent effect, and 87.6% said that speeding up executions wouldn't work either.




Public opinion also reflects these findings. In a 2006 Gallup Poll, only 34% of respondents agreed that "the death penalty acts as a deterrent to the commitment of murder, that it lowers the murder rate." In 2004, 62% of people said the death penalty was not a deterrent. By contrast, in 1985, 62% believed the death penalty acted as a deterrent to murder.

# EXHIBIT 31

**Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates**

| Year | 1991 (http://www.deathpenaltyinfo.org/documents/coop1991.pdf) | 1992 (http://www.deathpenaltyinfo.org/documents/coop1992.pdf) | 1993 (http://www.deathpenaltyinfo.org/documents/coop1993.pdf) | (http://www.deathpe |
|---|---|---|---|---|
| Murder Rate in Death Penalty States* | 9.94 | 9.51 | 9.69 | |
| Murder Rate in Non-death Penalty States | 9.27 | 8.63 | 8.81 | 7.88 |
| Percent Difference | 7% | 10% | 10% | |

(click on year to see the murder rates and calculations involved in this analysis, provided by David Cooper)
* Includes Kansas and New York in the years after they adopted the death penalty, 1994 and 1995 respectively. New Jersey and New York ended the death penalty in the latter part of 2007 and will not be counted as death penalty states in 2008.

Notes:

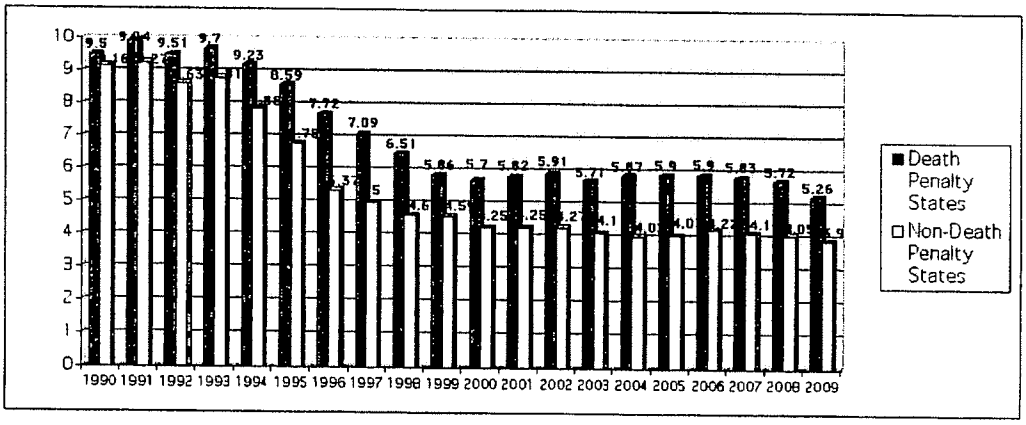
*Populations are from the U.S. Census estimates for each year.*

*Murder rates are from the FBI's "Crime in the United States" and are per 100,000 population.*

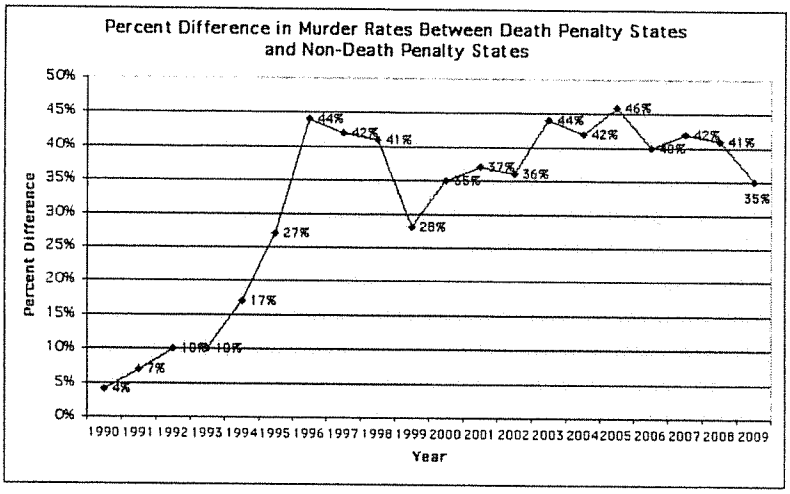
*The murder rate for the region (death penalty states or non-death penalty states) is the total number of murders in the region divided by the total population (and then multiplied by 100,000)*

*In calculations that include Kansas and New York, Kansas is counted as a death penalty state from 1994 and New York from 1996, since New York's law did not become effective until September, 1995.*

**Murder Rates in Death Penalty States and Non-Death Penalty States**




The murder rate in non-death penalty states has remained consistently lower than the rate in states with the death penalty, and the gap has grown since 1990.

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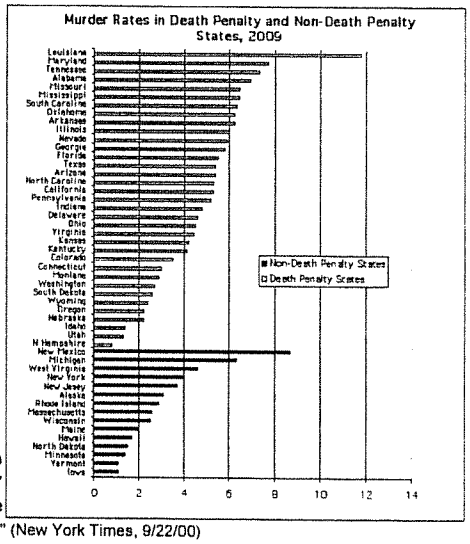
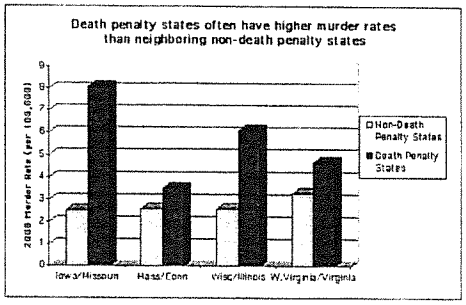
**STUDIES COMPARING STATES WITH THE DEATH PENALTY AND STATES WITHOUT**

**Michigan Lawmakers Reaffirm State's Longstanding Ban on Capital Punishment** - In a vote upholding the state's longstanding abolition of the death penalty, Michigan lawmakers refused to support a measure that would have put capital punishment before state voters in a referendum. The vote fell 18 short of the 2/3 required for passage. During a lengthy House debate regarding the bill, Representative Jack Minor (D-Flint) told his colleagues that studies show crime rates are lower in states without the death penalty. He noted, "The death penalty's not a deterrent. In fact, the figures would suggest it's just the opposite." Other opponents of the measure stated that "revenge" would not help victims' families. Michigan has not had the death penalty for 158 years, and voters have not addressed the issue since its abolition was included in the 1963 revision of the state constitution. Michigan is one of 12 states in the U.S. that does not have a death penalty. (Michigan Live, March 19, 2004) The state was the first English speaking government in the world to ban the practice.




**States Without the Death Penalty Have Better Record on Homicide Rates** - A new survey by the New York Times found that states without the death penalty have lower homicide rates than states with the death penalty. The Times reports that ten of the twelve states without the death penalty have homicide rates below the national average, whereas half of the states with the death penalty have homicide rates above. During the last 20 years, the homicide rate in states with the death penalty has been 48% - 101% higher than in states without the death penalty. "I think Michigan made a wise decision 150 years ago," said the state's governor, John Engler, a Republican, referring to the state's abolition of the death penalty in 1846. "We're pretty proud of the fact that we don't have the death penalty." (New York Times, 9/22/00)

**States Without the Death Penalty Fared Better Over Past Decade** - In the past ten years, the number of executions in the U.S. has increased while the murder rate has declined. Some commentators have maintained that the murder rate has dropped because of the increase in executions (see, e.g., W. Tucker, "Yes, the Death Penalty Deters," Wall St. Journal, June 21, 2002). However, during this decade the murder rate in non-death penalty states has remained consistently lower than the rate in states with the death penalty.




When comparisons are made between states with the death penalty and states without, the majority of death penalty states show murder rates higher than non-death penalty states. The average of murder rates per 100,000 population in 1999 among death penalty states was 5.5, whereas the average of murder rates among non-death penalty states was only 3.6.

A look at neighboring death penalty and non-death penalty states show similar trends. Death penalty states usually have a higher murder rate than their neighboring non-death penalty states.

**Return to Deterrence** (http://www.deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty)

See also Murder Rates (http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state)

Tweet (http://twitter.com/share)

# EXHIBIT 32

THE BLADE
One of America's Great Newspapers

Printed Monday, September 09, 2013

# Family sues over botched Ohio execution

BY ERICA BLAKE
BLADE STAFF WRITER

OBJECT15147760-701d-42ea-a2bf-e30ecdf1fb8aWhen Michael Manning arrived to witness the May, 2006, execution of Joseph Lewis Clark, he was intent on watching justice served against his brother's killer.

Yesterday, Mr. Manning stood shoulder to shoulder with Clark's brother to speak out against the lengthy and seemingly painful execution.

Mr. Manning joined members of the Clark family as they spoke about a lawsuit filed early yesterday in U.S. District Court in Cincinnati. Filed by Clark's mother, Irma Clark, the lawsuit asks for monetary damages. But those involved said that the larger goal is to achieve change.

"I believe in the constitutionality part of [the death penalty]," said Mr. Manning, who is not a party in the lawsuit. "Even though I do believe in the death penalty, I also believe that no one should have to die a horrible death and that's what Joseph did, died a horrible death."

Mr. Manning admitted that many members of his family do not agree with his alliance with the Clark family.

Those who witnessed Clark's execution saw a procedure that typically lasts approximately 10 minutes drag into one that lasted 86 minutes.

The execution team struggled for 25 minutes to find usable veins in Clark's arms before making the decision to proceed with just one intravenous shunt in his left arm.

OBJECT61d88cb6-ce7c-42f0-98f4-3ef6739287aaAfter uttering his final words, Clark lay extremely still, breathing shallowly.

A witness described the scene as one where Clark appeared to have fallen asleep, except for the occasional movement of his feet.

But after a few moments, Clark raised his head, shook it back and forth, and repeatedly declared, "It don't work."

Prior to his arrest, Clark had been a longtime intravenous drug user.

The execution team then closed a curtain to block witnesses' view of the execution chamber, but witnesses - including Mr. Manning - said Clark's moans and groans were audible through the glass.

Clark's brother, Dennis, said yesterday that no one from his family was at the execution per his brother's requests. He added that he does not condone his brother's actions but that he is concerned about the state's method of execution.

"What my brother did was wrong. He committed a crime, he did the time, and ultimately he paid the price," Mr. Clark said.

"I just want to see it done right," he added. "If it's done right, we wouldn't be here."

Clark was executed at the Southern Ohio Correctional Facility in Lucasville, Ohio, for the 1984 slaying of David Manning, a 23-year-old husband and father who was shot at a gas station on Airport Highway in South Toledo.

He received a life sentence for killing another clerk, Donald Harris, 21, the night before at a store on Hill Avenue.

Clark was arrested after shooting a third man, Robert Roloff, during a holdup at a bank ATM in Toledo three days after Mr. Manning's death. Mr. Roloff survived.

Attorney Alan Konop, who is representing the Clark family, said the lawsuit asks for $150,000 but ultimately any award would be up to a judge or jury. He added that more importantly, the family hopes to start an open and transparent discussion of the problems.

Clark's execution wasn't the only one plagued with problems, Mr. Konop said. On May 24, executioners had trouble inserting needles into the veins of Christopher Newton, who had insisted on the death penalty as a punishment for killing a cellmate. The execution team stuck him at least 10 times with needles to get in place the shunts through which chemicals are injected. Prison officials said the difficulty prison staff had finding Newton's veins resulted from the girth of the 6-foot, 265-pound inmate.

Mr. Konop said that both the Eighth Amendment of the U.S. Constitution and Ohio law require "a swift and humane execution procedure." He added that Clark's execution "failed to comply with these basic standards of civility."

Named in the lawsuit are Edwin Voorhies, warden of the Southern Ohio Correctional Facility, State Prisons Director Terry Collins, and 12 unnamed execution team members.

"This is an individual lawsuit by an individual family so we can merely ask for damages," Mr. Konop said. "The hope of the family is that this will give the state an opportunity to make changes."

Mr. Konop said that an independent autopsy conducted on Clark's body by Dr. L.J. Drogovic, chief medical examiner for Oakland County, Mich., concluded that Clark had numerous needle puncture wounds.

A spokesman for Attorney General's Marc Dann's office declined comment, saying that the corrections division had not yet been served the lawsuit.

Contact Erica Blake at:

eblake@theblade.com

or 419-213-2134.

# EXHIBIT 33

February 25, 2009

# Citing Cost, States Consider End to Death Penalty

By IAN URBINA

ANNAPOLIS, Md. — When Gov. Martin O'Malley appeared before the Maryland Senate last week, he made an unconventional argument that is becoming increasingly popular in cash-strapped states: abolish the death penalty to cut costs.

Mr. O'Malley, a Democrat and a Roman Catholic who has cited religious opposition to the death penalty in the past, is now arguing that capital cases cost three times as much as homicide cases where the death penalty is not sought. "And we can't afford that," he said, "when there are better and cheaper ways to reduce crime."

Lawmakers in Colorado, Kansas, Nebraska and New Hampshire have made the same argument in recent months as they push bills seeking to repeal the death penalty, and experts say such bills have a good chance of passing in Maryland, Montana and New Mexico.

Death penalty opponents say they still face an uphill battle, but they are pleased to have allies raising the economic argument.

Efforts to repeal the death penalty are part of a broader trend in which states are trying to cut the costs of being tough on crime. Virginia and at least four other states, for example, are considering releasing nonviolent offenders early to reduce costs.

The economic realities have forced even longtime supporters of the death penalty, like Gov. Bill Richardson of New Mexico, to rethink their positions.

Mr. Richardson, a Democrat, has said he may sign a bill repealing capital punishment that passed the House last week and is pending in a Senate committee. He cited growing concerns about miscarriages of justice, but he added that cost was a factor in his shifting views and was "a valid reason in this era of austerity and tight budgets."

Capital cases are expensive because the trials tend to take longer, they typically require more lawyers and more costly expert witnesses, and they are far more likely to lead to multiple appeals.

In New Mexico, lawmakers who support the repeal bill have pointed out that despite the added expense, most defendants end up with life sentences anyway.

That has been true in Maryland. A 2008 study by the Urban Institute, a nonpartisan public policy group, found that in the 20 years after the state reinstated the death penalty in 1978, prosecutors sought the death penalty in 162 felony-homicide convictions, securing it in 56 cases, most of which were overturned; the rest of the convictions led to prison sentences.

Since 1978, five people have been executed in Maryland, and five inmates are on death row.

Opponents of repealing capital punishment say such measures are short-sighted and will result in more crime and greater costs to states down the road. At a time when police departments are being scaled down to save money, the role of the death penalty in deterring certain crimes is more important than ever, they say.

"How do you put a price tag on crimes that don't happen because threat of the death penalty deters them?" said Scott Shellenberger, the state's attorney for Baltimore County, Md., who opposes the repeal bill.

Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, an organization in Sacramento that works on behalf of crime victims, called the anticipated savings a mirage. He added that with the death penalty, prosecutors can more easily offer life sentences in a plea bargain and thus avoid trial costs.

But Eric M. Freedman, a death penalty expert at Hofstra Law School, said studies had shown that plea bargaining rates were roughly the same in states that had the death penalty as in states that did not.

"It makes perfect sense that states are trying to spend their criminal justice budgets better," he said, "and that the first place they look to do a cost-benefit analysis is the death penalty."

States are looking elsewhere as well.

Last year, in an effort to cut costs, probation and parole agencies in Arizona, Kentucky, Mississippi, New Jersey and Vermont reduced or dropped prison time for thousands of offenders who violated conditions of their release. In some states, probation and parole violators account for up to two-thirds of prison admissions each year; typical violations are failing drug tests or missing meetings with parole officers.

As prison crowding has become acute, lawsuits have followed in states like California, and politicians find themselves having to choose among politically unattractive options: spend scarce tax dollars on expanding prisons, loosen laws to stem the flow of incarcerations, or release some nonviolent offenders.

The costs of death penalty cases can be extraordinarily high.

The Urban Institute study of Maryland concluded that because of appeals, it cost as much as $1.9 million more for a state prosecutor to put someone on death row than it did to put a person in prison. A case that resulted in a death sentence cost $3 million, the study found, compared with less than $1.1 million for a case in which the death penalty was not sought.

In Kansas, State Senator Carolyn McGinn introduced a bill this month that would abolish the death penalty in cases sentenced after July 1. "We are in such a dire deficit situation, and we need to look at things outside the box to solve our budget problems," said Mrs. McGinn, a Republican. Kansas is facing a budget shortfall of $199 million, and Mrs. McGinn said that opting for life imprisonment without parole rather than the death penalty could save the state over $500,000 per capital case.

But skeptics contend that prosecutors will still be on salary and will still spend the same amount, just on different cases. In Colorado, lawmakers plan to consider a bill this week that would abolish the death penalty and use the savings to create a cold-case unit to investigate the state's roughly 1,400 unsolved

murders. While the police must continue investigating these cases, there is no money in the budget for that. A group of families who lost relatives in unsolved murders has lobbied lawmakers on the bill.

In Virginia, competing sentiments are evident in the legislature.

While lawmakers have proposed allowing prison officials to release low-risk offenders up to 90 days before the end of their sentences, citing a potential saving of $50 million, they are also considering expanding who is eligible for capital punishment to people who assist in killings but do not commit them and to people convicted of murdering fire marshals or auxiliary police officers who are on duty.

It is considered unlikely, however, that Gov. Tim Kaine, a Democrat who opposes capital punishment, would sign such a bill.

In 2007, New Jersey became the first state in a generation to abolish the death penalty.

That same year, a vote in Maryland to abolish the death penalty came up one vote short of passing. In December, however, a state commission on capital punishment recommended that Maryland abolish the death penalty because of the high cost and the danger of executing an innocent person.

# EXHIBIT 34

NEWS

All Sections

Home > Featured Articles > **Death Penalty**

# What killed Illinois' death penalty

## It wasn't the question of morality but the question of accuracy that led state to abolish capital punishment

March 10, 2011 | By Steve Mills, Tribune reporter

2

If there was one moment when Illinois' death penalty began to die, it was on Feb. 5, 1999, when a man named Anthony Porter walked out of jail a free man.

Sitting in the governor's mansion, George Ryan watched Porter's release on television and wondered how a man could come within 50 hours of being executed, only to be set free by the efforts of a journalism professor, his students and a private investigator.



"And so I turned to my wife, and I said, how the hell does that happen? How does an innocent man sit on death row for 15 years and gets no relief," Ryan recalled last year. "And that piqued my interest, Anthony Porter."

To be sure, by the time Porter was set free, the foundation of Illinois' death penalty system already had begun to erode by the steady stream of inmates who had death sentences or murder convictions vacated: Rolando Cruz and Alejandro Hernandez in the Jeanine Nicarico case, the men known as the Ford Heights Four, Gary Gauger.

But for decades, the debate over capital punishment rarely strayed from whether it was right or wrong, a moral argument that was waged mostly by a narrow group of attorneys and abolition supporters that could be easily dismissed. Public opinion polls showed little movement. Death sentences and executions hit record levels.

Inmates like the serial killer John Wayne Gacy, whose guilt was never in question, were put to death and caused little controversy. But when a miscarriage of justice was discovered and a death row inmate was set free, the police and prosecutors contended that it was an isolated incident, an anomaly. They got little argument.

In November 1998, the Center on Wrongful Convictions at Northwestern University hosted 29 exonerated death row inmates at a conference, putting a human face to the death penalty's errors. Then, with Porter's case still in the spotlight, plus a series of stories in the Chicago Tribune later that year that illuminated deep frailties in the state's system of capital punishment, the debate over the death penalty was transformed.

Suddenly, it was about accuracy. No longer were the mistakes anecdotal. The problems were systemic.

Opposition to the death penalty began to win new supporters, people who looked at the issue pragmatically, not just morally, and were dismayed by the mistakes. Politicians no longer saw the issue as a third rail with voters. Ryan, who declared a halt to all executions in 2000, found it did not cost him politically.

A decade after Ryan declared a moratorium, 61 percent of voters questioned in a poll did not even know the state still had a death penalty, reflecting a stalemate of sorts that had emerged between supporters of abolition and those who wanted to bring back capital punishment. No one was being put to death, yet death row again was receiving inmates, though at a slower pace than before the Ryan moratorium.

Had Republican Bill Brady won the November general election instead of Democrat Pat Quinn, the state still would have a death penalty, and the new governor almost certainly would have lifted the moratorium and allowed executions to resume.



Ultimately, supporters of abolition in the General Assembly — frustrated that sufficient reform had not been enacted and stung by the costs of trials and appeals — voted to abolish the death penalty. On Wednesday, Quinn signed abolition into law and commuted the sentences of 15 inmates who had been sentenced to death since the moratorium.

"That isolated image of Anthony Porter is crucial," said Lawrence Marshall, a former legal director of the Center on Wrongful Convictions and a key player in the abolition of the death penalty. "But it only makes a difference when it comes amidst all of those other incidents. It shows (the problems weren't) isolated. This was a trend."

With Quinn's signature, Illinois became the fourth state to abandon the death penalty over the last decade, and the isolation of the use of capital punishment, mostly in the South, is a national trend, said Richard Dieter, executive director of the Death Penalty Information Center, which opposes capital punishment.

The New Jersey Legislature voted to drop the death penalty in 2007. A New York appeals court ruled the death penalty unconstitutional in 2004. And in 2009, the New Mexico Legislature voted to repeal capital punishment; Gov. Bill Richardson signed the bill into law.

Other states have convened panels to study the death penalty and have considered legislation to end it, prompted by the exonerations of condemned inmates; capital punishment's high cost, particularly in a down economy; and the widening support for life in prison without parole as an alternative sentence, Dieter said.



1 | 2 | Next

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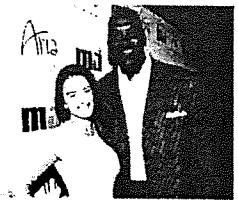

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# EXHIBIT 35

The New York Times

April 11, 2012

# Death Penalty Repeal Goes to Connecticut Governor

By PETER APPLEBOME

HARTFORD — After more than nine hours of debate, the Connecticut House of Representatives voted on Wednesday to repeal the state's death penalty, following a similar vote in the State Senate last week. Gov. Dannel P. Malloy, a Democrat, has said he will sign the bill, which would make Connecticut the 17th state — the 5th in five years — to abolish capital punishment for future cases.

Mr. Malloy's signature will leave New Hampshire and Pennsylvania as the only states in the Northeast that still have the death penalty. New Jersey repealed it in 2007. New York's statute was ruled unconstitutional by the state's highest court in 2004, and lawmakers have not moved to fix the law.

The vote, after more than two decades of debate and the 2009 veto of a similar bill by the governor at the time, M. Jodi Rell, a Republican, came against the backdrop of one of the state's most horrific crimes: a 2007 home invasion in Cheshire in which Jennifer Hawke-Petit and her daughters, Hayley, 17, and Michaela, 11, were held hostage and murdered, two of the three raped, and their house set afire by two habitual criminals who are now on death row. Ms. Hawke-Petit's husband, Dr. William A. Petit Jr., who was badly beaten but escaped, has since been an ardent advocate for keeping the death penalty.

The bill exempts the 11 men currently on death row, including Joshua Komisarjevsky and Steven J. Hayes, the men convicted of the Petit murders.

The measure was approved by a vote of 86 to 62, largely along party lines.

The legislation will make life in prison without possibility of parole the state's harshest punishment. It mandates that those given life without parole be incarcerated separately from other inmates and be limited to two hours a day outside the prison cell.

In a statement released late Wednesday night, Governor Malloy said the repeal put Connecticut in the same position as nearly every other industrialized nation on the death penalty.

"For decades, we have not had a workable death penalty," he said, noting that only one person has been executed in Connecticut in the last 52 years. "Going forward, we will have a system that allows us to put these people away for life, in living conditions none of us would want to experience. Let's throw away the key and have them spend the rest of their natural lives in jail."

Thirteen proposed amendments from supporters of capital punishment, most of which would have allowed the death penalty in certain cases, were defeated during the debate, in which many legislators told personal stories of the effects of violent crime. The lawmakers also invoked a wide variety of people, from mass murderers to Immanuel Kant to Sir Thomas More.

State Representative Patricia M. Widlitz, a Democrat from Branford and Guilford, said that like many members, she was torn over her vote. But she recalled a murder in her community and the difficulty residents went through in explaining it to local children. "I just couldn't reconcile telling them that it's O.K. for the government to kill after teaching them that killing is wrong, it's unacceptable, it's immoral," she said.

She added that the killer was sentenced to life without parole. "I think in many ways, that is a death sentence, with no chance of parole, no chance of doing anything with your life," she said.

Republican critics of the bill said the exemption for those currently awaiting execution cast a cloud over the vote, both because it undercut the moral argument of death penalty opponents and because future appeals or government action had the potential to spare the 11 men.

"Let's not mislead the public; let's not mislead ourselves" said the House minority leader, Lawrence Cafero Jr., of Norwalk. "If it is the will of this chamber that this state is no longer in the business of executing people, then let's say it and do it. You cannot have it both ways."

But Democratic legislators — swayed by at least 138 cases nationally in which people sentenced to death were later exonerated and by arguments that the death penalty is imposed in a capricious, discriminatory manner and is not a deterrent to crime — voted for repeal. They noted that a repeal in New Mexico in 2009 that also exempted those already on death row had thus far withstood challenges.

After Connecticut's repeal, 33 states will have capital punishment, along with the United States government when it prosecutes cases in the federal courts. Voters in California will be asked in November whether to abolish the death penalty in that state.

Capital punishment in Connecticut dates to colonial times. From 1639 to 2005, it performed 126 executions, first by hanging, then by the electric chair, and since 1973, by lethal injection. But since 1976, when the Supreme Court allowed the resumption of executions, there has been just one person executed in the state: Michael Bruce Ross, a serial killer who voluntarily gave up his right to further appeals and was put to death in 2005. The last person involuntarily put to death, in 1960, was Joseph (Mad Dog) Taborsky, who committed a string of robberies and killings.

Of the 1,289 executions since 1976 in the United States, 935 were in seven Southern and border states. Texas alone accounts for 481 executions.

In the Connecticut Senate, where passage seemed most in doubt, the bill was approved 20 to 16 on April 5, with 2 Democrats and all 14 Republicans opposed. Democrats have a majority in both chambers of the General Assembly.

Before that vote, Dr. Petit spoke at a news conference where he called for the Senate not to pass the bill. "We believe in the death penalty because we believe it is really the only true just punishment for certain heinous and depraved murders," he said.

The Petit murders were cited by several opponents of the repeal, most vividly by Representative Al Adinolfi, a Republican from Cheshire, Hamden and Wallingford, who said he witnessed the chaos at the Petits' smoldering house that day. He recounted gruesome details of the crime in arguing against the repeal.

"And we say here that Komisarjevsky and Hayes don't deserve the death penalty? Shame on us," he said. "They do deserve the penalty, and so do many others."

But Democrats in favor of the bill cited support from many families of murder victims and the fact that capital punishment has long been banned by nearly all of the world's democracies. In a review of 34 years of Connecticut death penalty cases, Prof. John Donohue of Stanford Law School concluded that "arbitrariness and discrimination are defining features of the state's capital punishment regime."

The political fight over the bill could persist long after the vote. Republicans are likely to put the issue in play in the fall when all 36 State Senate and 151 State House seats are up for election. A recent Quinnipiac University poll found that 62 percent of Connecticut residents thought abolishing the death penalty was "a bad idea," though polls over time have found respondents split relatively evenly if given the option of life without parole as an alternative to executions.

In the final remarks in the debate late Wednesday, the House majority leader, Brendan Sharkey, a Democrat from Hamden, said the death penalty offered a false promise that did more harm than good.

"I believe that we, as human beings, should not create laws that reciprocate the evil perpetrated against society," Mr. Sharkey said. "Those laws don't protect us."

# EXHIBIT 36

# Nevada, Illinois among states that can't pay their bills



**Bottom Line,**

Jan. 18, 2012 at 10:47 AM ET

AP

Nevada is among the states most stung by the downturn. Between 2006 and 2010, home values plummeted a staggering 44.5 percent.

***By Michael B. Sauter, Charles B. Stockdale and Ashley C. Allen, 24/7 Wall St.***

Balancing the budget is not just a federal problem, but a state one as well. The Great Recession resulted in some of the worst state revenues and budget shortages of all time. According to a report on state budgets by the Center for Budget Policy Priorities, dozens of states faced shortfalls of hundreds of millions — or even billions — of dollars.



24/7 Wall St. examined the 10 states that had budget shortfalls of 27 percent or more of their general funds for fiscal year 2011 — the states that were short the most money before they balanced their budgets. For the most part, the states with the worst budget gaps also had among the most anemic economies. Because of their budget shortfalls, all of them have been forced to make dramatic cuts to government services.

Every state but Vermont is required by its own law to balance the budget. In order to do so, state governments have to take extreme measures, instituting deep cuts that often hurt a diversity of residents. In the 2011 fiscal year, 29 states made cuts to services benefiting the disabled and elderly, 34 reduced funds for K-12 and early education, and all but six states reduced positions, benefits or wages of government employees.

24/7 Wall St.: The best- and worst-run states in America

The housing crisis was one of the primary causes for many of the largest budget deficits. The housing markets in states such as Nevada, Illinois and Arizona — all of which are on the list — have been hit particularly hard. Home values in Nevada declined the largest amount in the country between 2006 and 2010. Home values in Arizona decreased the fifth-largest amount over that same period. Sick housing markets weaken the economy and lower tax bases, which hurts state revenues and in turn helps create a budget gap.

Overall, weak state economies contributed to lower revenues and rising budget shortfalls. Not surprisingly, states with slower-growing economies tended to have a larger budget gaps. And although the GDP of every state in the nation grew between 2006 and 2010, seven of the 10 states on this list fell within the 15 states with the smallest increases.

While economic slowdowns and housing problems hit most of the states with the worst budget gaps, there were some exceptions. In four of the 10 states, home values actually rose between 2006 and 2010, the worst period of the recession. Similarly, other states with budget shortfalls weathered the recession relatively well and managed to maintain fairly healthy economies. In Washington state, for example, the median income rose 5.8 percent, the 16th-most in the country, while GDP increased 13.4 percent, the 12th most.

These are the states that cannot pay their bills.

24/7 Wall St.: Worst product flops of 2011

**1. Nevada**

- **2011 budget shortfall as a percentage of general fund:** 54.5
- **2011 budget shortfall:** $1.8 billion
- **2012 projected budget shortfall:** 37.4 percent (the largest)
- **GDP change (2006 - 2010):** +1.2 percent (smallest increase)
- **Median home value change (2006 - 2010):** -44.5 percent (the largest decline)

No state has suffered during the recession more than Nevada. Between 2006 and 2010, home values plummeted a staggering 44.5 percent, the poverty rate increased 26 percent, median income dropped 3.8 percent and GDP increased only 1.2 percent. Each was the worst in the country for that category. Last year, Nevada's budget gap was $1.8 billion, the equivalent of 54.5 percent of available funds. This was the third year in a row the state has had one of the worst shortfalls in the country, and that trend appears ready to continue through at least 2013. In order to balance its budget last year, Nevada was forced to raise taxes significantly, cut dental and vision services from Medicaid coverage for adults, reduce financial aid funding, and cut state employee salaries.

**2. Illinois**

- **2011 budget shortfall as a percentage of general fund:** 40.2
- **2011 budget shortfall:** $13.5 billion
- **2012 projected budget shortfall:** 16.0 percent (11th largest)
- **GDP change (2006 - 2010):** +8.2 percent (13th smallest increase)

- **Median home value change (2006 - 2010):** -4.2 percent (11th largest decline)

Illinois has consistently had among the largest budget shortfalls in the country since 2009. It also was hit extremely hard by the recession. Between 2006 and 2010, home values decreased by 4.2 percent. GDP grew a relatively small 8.2 percent. Median household income increased less than 2 percent. The state made cuts in its budget for community mental health services for both children and adults, and it cut its school education funding by 4 percent, or $311 million. Governor Pat Quinn has announced also that he will lay off thousands of state employees.



24/7 Wall St.: The 10 most expensive weapons in the world

**3. Arizona**

- **2011 budget shortfall as a percentage of general fund:** 39.0
- **2011 budget shortfall:** $3.3 billion
- **2012 projected budget shortfall:** 17.0 percent (10th largest)
- **GDP change (2006 - 2010):** +2.7 percent (4th smallest increase)
- **Median home value change (2006 - 2010):** -28.6 percent (4th largest decline)

Like its neighbor Nevada, Arizona was hit particularly hard by the subprime mortgage crisis. Between 2006 and 2010, median home values plunged 28.6 percent in the state, the fourth worst price drop in the country. GDP, poverty and income levels have either stagnated or become significantly worse during this period. Since 2009, the state has had among the worst budget gaps in the country, a combined total of $12.1 billion for the three years. To balance its budget, Arizona has made dramatic budget cuts, including revoking Medicaid eligibility of more than 1 million low-income residents and cutting preschool for more than 4,000 children.



Click here for more states that cannot pay their bills

US Business Bottom Line

# EXHIBIT 37

# WNC chief resigns over Nevada budget cuts

## Carol Lucey: Legislature too painful to repeat

2:00 AM Jul 10, 2013

A A

Written by
Ray Hagar
rhagar@rgj.com

FILED UNDER

Local News
Education

Carol Lucey, after suffering through budget cuts in the past three sessions of the Legislature, said Tuesday that she will resign as president of Western Nevada College in Carson City.

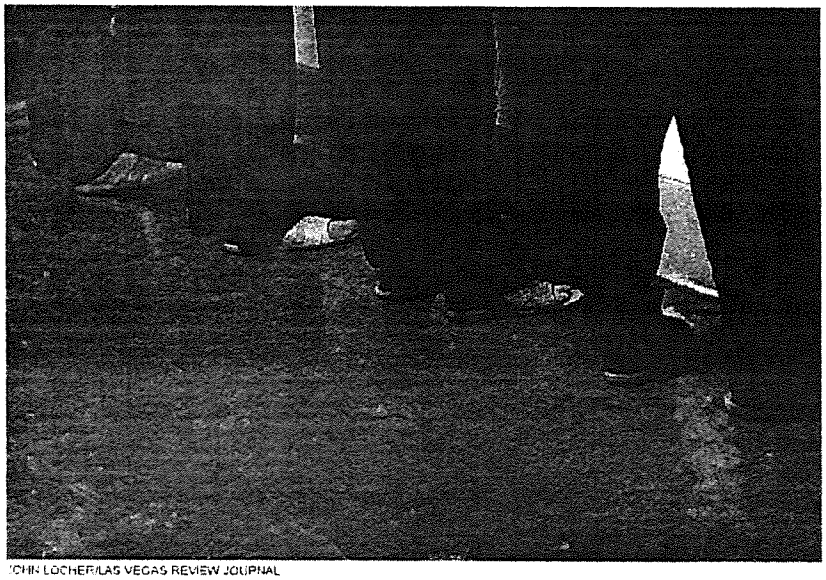
The announcement comes about a month after the end of the 2013 Legislature, which slashed the WNC budget by 11 percent over the next two years.

For Western Nevada, that means a $1.7 million cut in 2014 and $2.1 million in 2015, according to the appropriations bill from the 2013 Legislature. ...

# EXHIBIT 38

Posted April 14, 2013 - 12:20am Updated April 14, 2013 - 2:02am

# 'Broken' mental health system overwhelms Nevada



JOHN LOCHER/LAS VEGAS REVIEW-JOURNAL

Many mental health patients are frequently in and out of hospitals and jail

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**LEGISLATIVE ACTION**
Several bills dealing with the mentally ill are now under consideration by the Nevada Legislature.

By LAURA MYERS
LAS VEGAS REVIEW-JOURNAL

The man's story was terrifying. He had been tortured at the High Desert Prison in Indian Springs outside Las Vegas. He had been starved, beaten. A snake had been implanted in his stomach to slowly poison him to death.

"I can feel the venom pumping through me every time it bites me," he said.

Jon Norheim, a Clark County judicial hearing master, listened to this man's accusations during a recent court session to determine whether to involuntarily commit him to a psychiatric hospital.

Norheim told the man his snake problem might go away if he took his medication for schizophrenia.

"I'd take the pills," Norheim advised.



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■ AB287: Authorizes the involuntary court-ordered admission of people with mental illness to community or outpatient services. The bill is aimed at ensuring the mentally ill stay on medication and in treatment programs.
■ SB221: Gives the state only five days to send records to the National Instant Criminal Background Check System of mentally ill people involuntarily committed to a psychiatric hospital to prevent them from buying guns. Requires psychiatrists to inform law enforcement and potential victims when a patient threatens somebody and has the means to carry out the threat. Also, extends required gun background checks to private purchases and transfer of firearms.
■ SB277: Prohibits a mentally ill person who is subject of a legal petition for involuntary commitment to a psychiatric hospital from buying a gun. Requires the information to be reported to the National Instant Criminal Background Check System. Allows people to later apply to have their gun rights restored.

PSYCHIATRIC HOSPITAL BEDS

Nevada has about 1,170 psychiatric hospital beds, according to the Nevada State Health Division. The state runs three adult psychiatric hospitals:
■ Rawson-Neal in Las Vegas. Licensed for 289 beds, but budgeted for 190 beds, including 160 for inpatient care and 30 as part of its psychiatric observation unit.
■ Dini-Townsend in Sparks. Licensed for 70 beds but budgeted for 50, including 40 for inpatient care and 10 for an observation unit.
■ Lakes Crossing in Sparks. Licensed and budgeted for 66 inpatient beds. The maximum security facility evaluates mentally ill inmates to determine if they are competent to stand trial and treats them to restore competency.
■ Southern Nevada Adult Mental Health Services also operates seven outpatient clinics, including two in Las Vegas and one each in Henderson, Laughlin, Mesquite, Pahrump and Caliente.

BUDGET CUTS

Since the recession hit in 2007, the budget and staffing for the Nevada Division of Mental Health and Developmental

"I'd rather have it surgically removed," the man said, refusing to take his meds.

The Hispanic man in his mid-20s glared at Norheim from across the room. He balled up his fists, muscles tensed against his shirt. Two doctors sitting near him stood and moved away. Two beefy orderlies drew closer.

"Your staff is draining me," the man said. "They actually murdered me, but after 15 hours I resuscitated myself."

The room went silent, the accusation hanging in the air.

"So am I being released?" the man asked after a pause.

"No," Norheim answered. "We've got to fix the problem."

"OK. Have it your way," the man said then abruptly stood up to leave.

His was the last case on the docket of about two dozen patients who came before Norheim that Friday in a makeshift courtroom at the Rawson-Neal Psychiatric Hospital, a state-run acute care facility.

The disturbed man lingered in the cafeteria next to the room where Norheim held court. The agitated patient was left alone, with no attendants to escort him to his room. A guard who accompanies Norheim told the judge, court staffers and doctors in the room to hang tight.

The man wandered outside and walked across a grassy courtyard toward the reception area and main hospital entrance, his way barred by a locked door. A half-dozen hospital staffers surrounded him, moving slowly and speaking calmly.

"I'm legally dead!" the man shouted, then tried to rush the door.

Staffers took him down, pinning his arms and legs, and then securing him in a chair with restraints.

Undaunted by the drama, Norheim said he understood the man's panic.

"To him, the snake inside him is real," Norheim said. "Sometimes, they talk to people we can't see. Las Vegas is a mecca for the mentally ill."

MORE WORK ON THE WAY?

Norheim holds court twice a week at Rawson-Neal, hearing as many as 50 cases each visit. His job is to judge, with the help of psychiatrists and psychologists, whether severely mentally ill men and women are such a danger to themselves or others that they must be held against their will.

Involuntary commitments are rare in Nevada — only 170 cases in 2012 — because most patients quickly stabilize on medication or a psychic break caused by heavy drug or alcohol abuse resolves itself when the person sobers up, he said.

But Norheim's caseload could increase under a proposal before the Nevada Legislature that would allow courts to retain control of mentally ill people without institutionalizing them. AB287 would allow police to forcibly take mentally ill outpatients to medication and counseling appointments under court order.

While the workload for judges would increase, Nevada health authorities hope the new legal tool, if passed, will ease the burden on crowded hospital emergency rooms and on Rawson-Neal, which has become a revolving door for thousands of mentally ill people each year.

The program would target several hundred patients who have "a history of noncompliance with treatment for mental illness" and are frequently in and out of hospitals and jail, according to the legislation. A plan of treatment would be developed and a mental health professional assigned to coordinate each case for six months. If a patient succeeds in treatment, the court order could be dissolved. It also could be renewed.

"The vast majority of these people are repeat people," Norheim said. "People we've seen again and again and again. They go off their meds or their meds aren't working and they're back here."

Norheim, who has heard commitment cases for 17 years for Clark County District Court, said he has seen some people dozens of times, and some predate his time on the job. He blames a lack of funding, housing, case managers, treatment facilities and intense supervision programs for the repeats.

"The most frustrating thing is we can't do enough for these people," Norheim said, noting many are homeless and lack a support system. "Families eventually just walk away."

FEW OPTIONS

Erin Kinard, director of the WestCare Community Triage Center, said her nonprofit organization on April 1 launched a program called Safe Haven for intensive case management of 25 mentally ill people. She said group homes and treatment facilities come and go. Finding care is a challenge.

Services has been cut by a total $80 million in general fund spending. Nevada health officials say much of the savings came from being more efficient with pharmaceutical purchases and not from cutting programs. Officials said a 19 percent reduction in staffing was achieved mostly by not filling vacant positions.

- 2007-09: The approved budget was $721.2 million, including $498.3 million from the state general fund.
- 2009-11: The approved budget was $705.4 million, including $465.7 million from the state general fund. Staffing fell from 1,918.6 positions to 1,724.74 positions.
- 2011-13: The approved budget was $631.2 million, including $418.3 million from the state general fund. Staffing was cut to 1,554.5 positions

HIGH SUICIDE RATE

Nevada has the fifth-highest suicide rate in the nation with about 19 deaths per 100,000 residents, according to the latest statistics from the Centers for Disease Control and Prevention. The national average is about 12 per 100,000. Nevadans also have a higher rate of mental illness than the national average, according to a 2011 CDC report. Additional indicators of mental health include:

- The average number of mentally unhealthy days in a month among Nevada adults is 4, compared to 3.5 nationally.
- 15.5 percent of Nevada adults have received a diagnosis of depression during their lifetime.
- 11.6 percent of Nevada adults have received a diagnosis of anxiety during their lifetime.
- 4 percent of Nevada adults experience serious psychological stress at any one time.

"There's always a need and waiting lists," Kinard said, adding that most of the patients have drug or alcohol problems they're dealing with as well. "There aren't enough resources."

Dr. Dale Carrison, the chief of staff and head of emergency medicine at University Medical Center, is more blunt.

"The mental health system has been broken since I got to Las Vegas 22 years ago," Carrison said. "There aren't a lot of options for people. Every time they cut the budget they cut the mental health budget first. We do a very poor job of evaluating them and treating them. At some point, you've got to say the state just doesn't care."

UMC's crowded emergency room is grand central for the Las Vegas Valley's mentally ill. Often it's the first stop for police, who take them to the ER for a medical check before determining whether they need to be committed because of their actions or are unable to care for themselves.

The process involves submitting a "Legal 2000" request to put a person in custody for 72 hours for psychiatric observation to determine if the individual is a danger to himself or others. Doctors, psychologists, social workers, nurses, clinical counselors, therapists and police can sign a Legal 2000 order.

On average, about 50 mentally ill people are sitting in emergency rooms in Southern Nevada each day for a medical examination required for a Legal 2000 petition, the Nevada Department of Health and Human Services said.

Most cases are resolved within 72 hours, and the person is released from the hospital because they stabilized and are no longer a danger.

More than 8,000 patients go through Rawson-Neal each year, according to the Nevada State Health Division. The average stay at the acute care facility is about a week but can range from a few days to a few months. It costs an average of about $850 per day per patient, according to 2011 testimony before the Nevada Legislature.

If insurance doesn't cover the cost, state and federal programs for indigents will likely pay the tab.

About two-thirds of the patients are discharged to homes or private residences. Another 18 percent are sent to other residential and institutional settings, including group homes. Some 12 percent go to homeless shelters; 4 percent are sent to other agencies or treatment facilities; and 2 percent discharge to self-care, or a weekly motel.

Nevada's mental health system recently came under fire after a schizophrenic man, James F. Brown, 48, told California homeless advocates that Southern Nevada Adult Mental Health Services in Las Vegas put him on a bus to Sacramento, Calif., dumping him in a city where he didn't know anyone.

Nevada health officials acknowledged that discharge policies and procedures for Rawson-Neal weren't followed in Brown's case, and a state investigation turned up two more unsafe discharges. As a result, authorities instituted new rules that require a second doctor to sign off before discharge and for the head of the hospital to authorize all out-of-state transportation to ensure family, friends or a program is ready to help the patient on arrival.

"We blew it and we're taking corrective action," Mike Willden, director of Nevada Health and Human Services, told a state Senate panel in March during a public hearing examining the state's psychiatric discharge policies.

NEVADA 39TH IN FUNDING

State Sen. Debbie Smith, D-Sparks, said the state has cut $80 million from mental health funding since 2007, when the recession hit. As chairwoman of the Senate Finance Committee, Smith said she hopes to restore some of the money despite a tight budget and competing needs for education and other services.

The 2007 Legislature approved $498.3 million in 2007-09 general fund spending for Mental Health and Developmental Services, according to the department. That compares to $418.3 million approved by the 2011 Legislature for the 2011-13 biennium.

Overall spending, including federal funding, dropped from $721.2 million in 2007-09 to $631.2 million in 2011-13. Nevada health officials said much of the savings came from being more efficient with pharmaceutical purchases, not cutting programs. A 19 percent cut in staffing was achieved by attrition.

Compared to other states, Nevada's mental health spending of $57 per person is low, 39th place among the 50 states and the District of Columbia. The National Alliance on Mental Illness gave Nevada a "D" grade on its most recent report cards, in 2006 and in 2009.

"In a state with high rates of severe depression and other serious mental illnesses — as well as suicides — a strong commitment is needed to restore and expand the mental health safety net," the 2009 report said. "Without one, Nevada will find its emergency rooms and criminal justice system overwhelmed — and costs being shifted to other sectors of state and local government."

COLUMNISTS


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In response to Southern Nevada's greater need, Republican Gov. Brian Sandoval included in his 2014-15 budget request about $800,000 to open a 24-hour urgent care center for the mentally ill at Rawson-Neal. That could ease the burden on ERs. On April 2, the governor added another $4 million in proposed spending to help the mentally ill transition back into the community from jails and prisons.

Willden said now that Nevada is on the road to economic recovery he wants to rebuild the mental health system, starting with the 24-hour urgent care facility and transitional housing

"We all made tough decisions" during the recession, Willden said. "Was I happy to make those kinds of cuts? No. Now that the economy is improving, I think it's important for us to get back on track and to get our priorities right."

Still, there are not enough state beds for the severely mentally ill. Rawson-Neal, which opened in 2006, is budgeted for 190 beds, but another 100 beds from the older hospital remain mothballed.

Willden said the state is looking at reopening some of those older beds in the 1970s-era hospital building in hopes of creating a long-term mental health wing, which doesn't exist now. He also said the state is looking for potential partners to lease space to treat the mentally ill's drug and alcohol problems as well.

"Some of our patients require a longer term stay," Willden said, adding the old building would need work.

That doesn't take care of the staffing problem, however, after years of trimming way back.

Dean Nelson, director of psychology at Rawson-Neal, said he has just nine psychologists, down from 19 in 2007.

"It is bare bones," Nelson said. "There are more services we could be delivering."

He said hospital social workers help patients get into homeless shelters, group homes, assisted living situations, drug and alcohol treatment programs and offer other counseling and help, but there's little follow-up.

"Some of them are just fragile people," Nelson said. "If they don't have that stable environment, it's hard for the rest of their lives to get better."

Dr. Angelene Lawrence, head psychiatrist at Northern Nevada Adult Mental Health Services, said she is quitting in frustration after six years. She said there is a push for state psychiatrists to treat people whose main problems are drug, alcohol and behavioral, but not necessarily serious mental illness.

"I'd say 65 to 85 percent of the problem is drugs," Lawrence said. "A lot of these people kind of create their own illness. And I see it as getting worse. People believe criminal behavior is because of mental illness and therefore they should all come into the psychiatric hospital. They think I have the magical ability to fix them."

GOOD AND BAD CHOICES

Norheim's courtroom is witness to those broken lives.

The court allowed a reporter to watch the proceedings on condition that patients not be named to protect their privacy. The Review-Journal observed sessions on Feb. 20 and Feb. 22.

In one case, an 18-year-old woman who is a diagnosed schizophrenic refused to return home to her mother in Oakland, Calif. Instead, she said she wanted to stay in Las Vegas with a male "friend."

Though social workers report that the woman's mother told them the man is the woman's pimp, the teen denied it. Tears streamed down her face as she wailed uncontrollably.

"I'm emancipated!" she cried. "I don't want to live with her!"

Norheim told her that if the man would come to court he would release her to his care. She said he wouldn't, and broke into tears as orderlies led her away.

Two days later, the teen's male friend did appear. He sat silently, eyes down. She smiled widely. Doctors and social workers said the girl was stable and doing well.

Norheim asked if she would take her medication. She said yes. He asked if he could help her in any other way.

"No thank you," she said. "Just besides the medication."

After she and her friend had gone, Norheim shook his head. He had no reason to commit her. She was an adult who could make her own choices. Even bad ones.

"That makes me sick," Norheim said. "That's her pimp. I wish there was something I could do."

In many cases, patients can't kick their drug habits, contributing to their mental illnesses.

One 48-year-old cocaine addict who heard voices telling her to hurt herself refused immediate placement in a treatment program. Her eyes looked blank, her skin ashy, her teeth decayed.

"When a drug problem is so serious that you end up in a mental institution, for most people that's rock bottom," Norheim told the woman, who wouldn't meet his eyes. "You're going to end up dead."

"I'm going to help myself," the woman finally said, her voice a whisper.

The woman's daughter sat behind her, jaw set. Tearing up, she turned away to avoid looking at her mother.

Norheim released the woman. The daughter followed.

In a few instances, hospitalization served as a wake-up call, and patients were grateful for help.

One man said his life spiraled out of control after his grandmother and 3-year-old son died. He came to court with an IV port in his arm, midway through detox and needing intravenous fluids to avoid the DTs (delirium tremens).

"I was drinking a bottle and a half a day," he told Norheim. "I don't want to touch the bottle again."

Norheim said the man could stay in a private hospital until he finished detox, and then could go home.

"Thank you again for the opportunity," he told Norheim.

Several younger male patients had taken synthetic drugs and had gone temporarily mad, running down streets, getting into fights and causing disturbances. One patient, in his early 20s, kept rubbing the side of his face with his hands, almost as if to make sure he was there. He spoke slowly, the stupor not quite lifted.

"You've got to stay away from that stuff. It'll mess you up," Norheim said.

Some patients appeared ravaged by years of mental illness.

A Rwandan woman, brittle-thin, huddled in a coat draped over pajamas. Eyes wide, she seemed unaware of where she was. Voices had told her "everybody has to die." She stopped taking food to silence the voices. Four weeks later her family had her hospitalized.

"Her sons and husband want her home, but they want the voices to go away," a social worker said.

An interpreter, speaking Swahili, explained what the court session was about. Norheim continued her case to provide more hospital care.

DANGER TO THEMSELVES

Some patients end up at Rawson-Neal because they have nowhere else to go.

One seen by Norheim was an 84-year-old woman, suffering from dementia. She came to the hospital from an assisted living home.

"She wasn't following the rules so they kicked her out," her doctor said.

The woman, her gray hair tangled, looked around in silent confusion, eyes jumping from face to face.

The public defender who represents patients before the court asked that she be held at a private hospital until a guardian is appointed to ensure she gets proper care and is receiving Medicare.

In another case, an elderly woman refused to take her son home, saying a neighbor had threatened to shoot him if he goes onto his property. The man was arrested after beating the neighbor.

In his 40s, the man had long, blond hair and hadn't shaved in days. He wept and told Norheim that he had tried everything from Alcoholics Anonymous to drug rehabilitation, "but they never seem to work."

"I've never been so sober in my life," he said, pledging to try again to give up drugs and alcohol.

The vast majority of cases involved patients who appeared to be more a danger to themselves than anyone else.

One man had tried suicide by banging his head repeatedly against a wall. His forehead appeared split in two.

A woman, shackled for her own protection, needed surgery to repair anal tears from sharp objects she had inserted. She stared straight ahead, unresponsive, eyes dead.

Another woman, listless and with stringy hair, overdosed on pills. She was released to her mother.

"It was a mistake," the woman said of her suicide attempt. "I have two little girls. I have too much to live for."

Some patients appeared deep in dementia.

A squat man with closely cropped hair refused to sit. Hands on hips, he claimed to be an FBI informant in the witness protection program.

"He's highly dangerous," Norheim said after the man left the courtroom.

Norheim committed the most violent patients, including the snake man, a man who was arrested three times for assaulting family members and a man arrested for threatening people with a baseball bat in the street.

One violent patient raised his voice, becoming belligerent when Norheim refused to release him. He said he would refuse medication — a court order would be needed to force him to do so. He would get a private attorney and sue them all, the man added, slamming his hand on the table.

"They done make me crazy, though," he told Norheim, berating the police. "I don't have a mental illness. I'm not going to take it. All you are idiots. I'm going to have to shut down the entire institution."

Norheim said the man had back-to-back fights with police.

"He's lucky to be alive. He told them he will kill them. One of these times, it's not going to go well."

Contact reporter Laura Myers at lmyers @reviewjournal.com or 702-387-2919. Follow @lmyerslvrj on Twitter.

Southern Nevada mental... For Las Vegas man, struggle...

# EXHIBIT 39

# DeathPenaltyUSA

Juan Ignacio Blanco
crime reporter & criminalist



## U.S.A. Executions - 1977-Present

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## NEVADA

| # | Name | Date | Method | County |
|---|---|---|---|---|
| 12 | Darryll Linnie Mack | April 26, 2006 | Lethal Injection | Washoe |
| 11 | Terry Jess Dennis | August 12, 2004 | Lethal Injection | Washoe |
| 10 | Lawrence Colwell Jr. | March 26, 2004 | Lethal Injection | Clark |
| 9 | Sebastian Stephanus Bridges | April 21, 2001 | Lethal Injection | Clark |
| 8 | Alvaro Calambro | April 5, 1999 | Lethal Injection | Washoe |
| 7 | Roderick Abeyta | October 5, 1998 | Lethal Injection | Clark |
| 6 | Richard Allen Moran | March 30, 1996 | Lethal Injection | Clark |
| 5 | Thomas E. Baal | June 3, 1990 | Lethal Injection | Clark |
| 4 | Sean Patrick Flanagan | June 23, 1989 | Lethal Injection | Clark |
| 3 | William Paul Thompson | June 19, 1989 | Lethal Injection | Washoe |
| 2 | Carroll Edward Cole | December 6, 1985 | Lethal Injection | Clark |
| 1 | Jesse Walter Bishop | October 22, 1979 | Gas Chamber | Clark |

contact

# EXHIBIT 40

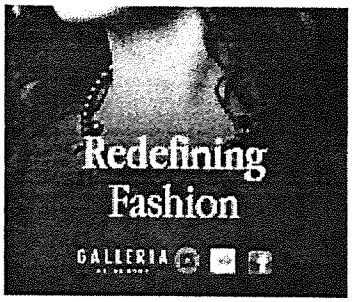
LAS VEGAS SUN

# Clark County teachers rally in campaign for smaller class sizes

By Paul Takahashi (contact)

Wednesday, March 13, 2013 | 8:30 p.m.

35, 38 and 44.




These are the number of students in some Clark County classrooms, according to teachers who rallied Wednesday afternoon against large class sizes.

As lawmakers discussed education changes and funding in Carson City, more than 65 members of the local teachers and culinary unions gathered at the Grant Sawyer Building to call attention to class sizes in Las Vegas, which are among the largest in the nation.

"Class sizes matter," said Clark County Education Association President Ruben Murillo, addressing members of the media over a loudspeaker. "It doesn't take a genius to figure out that the quality of education goes down with an increase in class size. We need the proper funding and resources to educate our kids."

Although Nevada has a class-size reduction program in the first to third grades, cash-strapped school districts were forced to increase class sizes during the recession to balance their budgets.

As a result, Clark County middle and high schools now have average class sizes of 34 and 35 students. Elementary schools have average class sizes of 20 to 21 in the first to third grades, and average class sizes of 33 and 34 in the fourth and fifth grades, according to district officials.

For comparison, the average class size nationally is about 25 students.

"This is shameful," said Hickey Elementary School teacher Shawn Bolin, who has 37 children in his fifth-grade class. "This needs to stop. We need more funding for our schools."

For the most part, the research backs teachers like Bolin, who advocate for smaller class sizes. Many studies show a link between small class sizes and higher student achievement.

Critics, however, aren't so sure. They argue that Nevada has shown little improvement in test scores despite implementing a class-size reduction plan in the early 1990s.

This debate over class sizes reared its head in the Legislature earlier this month when state Superintendent Jim Guthrie argued that an effective teacher trumped the issue of large class sizes. His testimony drew the ire of Democrats, who are pushing for more than $300 million in additional funding to expand class size reduction and early learning programs statewide.

Most teachers argue they can't give adequate attention to individual students when class sizes are too big.

There are 35 kindergartners in Ramona Morgan's class at Manch Elementary School. Because there is no class size cap on kindergarten, class sizes for this grade level often balloon to the high 30s.

"These babies need my attention and I can't get to all of them," Morgan said. "Having 35 kids (in a class) is just too much."

Furthermore, teachers argue classroom management and student discipline becomes more difficult the larger the class gets. Building relationships with students also becomes more of a challenge.

Hyde Park Middle School teacher Rita Morris counts about 40 students in her sixth-grade pre-Algebra classes. With that many students, Morris says it hard to engage all of her students.

"Just getting to know the kids is difficult," she said. "It's almost near impossible."

The teachers union is seeking more state funding to hire more teachers to reduce class sizes, said Executive Director John Vellardita.

State lawmakers have until Friday to act on a petition initiative that would create a 2 percent margins tax on businesses with revenues of $1 million or more. Legislators are also discussing a proposal to revise the state constitution to increase taxes on the mining industry to pay for more education funding.

Without a more stable source of education funding, none of the education policy changes — such as full -day kindergarten and early childhood education — will work, Vellardita said.

"You can't have all-day kindergarten or early childhood ed without addressing class sizes," he said. "That would be a recipe for failure."

Over the past two years, the School District has battled with the teachers union over contracts to raise more funding to reduce class sizes. A recent arbitration win is allowing the district to restore about 700 of the 1,000 teaching positions that were cut last year.

Hiring more teachers using money taken from educator pay raises irked some of the teachers at the rally, who hoisted signs that read: "Stop taking my $ to pay for costs."

Clark County School Board President Carolyn Edwards said she agreed with teachers who want more state funding to lower class sizes. The School District needs more funding from the Legislature, she said, but acknowledged that state money is still tight.

"Their hands are tied just as our hands are tied," Edwards said of lawmakers. "I'm glad the focus is on education. I hope they continue to focus on bringing back what has been cut (during the recession)."

As teachers formed a picket line and marched to chants, Hickey Elementary School teacher Jennifer Wolfe looked on with her 6-year-old daughter Sherri. The kindergartener shares her classroom at the northeast valley school with 34 other children.

"I'm worried about her education," Wolfe said. "It's so hard to get kids to learn when there are 30, 40 kids in a class."

As her mother talked, Sherri smiled and raised a picket sign. It read: "My class size is 35."

"Too much," Sherri said. "Too much."



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# Budget Cuts Force Reductions in Funding for Ski Team

Due to state budget cuts, the University of Nevada will reduce its funding for scholarships and operational costs for the Wolf Pack skiing team this year and will not fund the program after 2009-10, Director of Athletics Cary Groth announced Tuesday.

**RENO, Nev.** Due to state budget cuts, the University of Nevada will reduce its funding for scholarships and operational costs for the Wolf Pack skiing team this year and will not fund the program after 2009-10, Director of Athletics Cary Groth announced Tuesday.

Nevada will continue to fund tuition waivers for skiing student-athletes and personnel costs for the coaching staff for the 2009-10 season, but operational costs will be covered by donors or other sources of funding.

"We are all facing challenging economic times, and we have tried to make cuts that will have a minimal impact on the student-athlete experience. We didn't want to cut student-athletes' opportunities in sports, but we have had very tough choices to make and will not be able to fund the program after the 2009-10 season," Groth said.

"I have met with our ski staff and boosters, and we are discussing multiple alternatives of continuing our ski tradition. Possibilities include being funded by donors or becoming a club sport."

The University of Nevada sustained a 15 percent reduction in state funding totaling $33 million for each of the next two years. In addition to the cuts in the funding for skiing, the athletics department has made general reductions in scholarships, reduced all of its sport and operational budgets, trimmed support services like printing and mailing and made personnel cuts such as freezing and eliminating open positions.

PRINTTHIS

# Tentative CCSD budget shows a $64 million deficit

By Jessica Janner
CREATED APR. 11, 2012

**Las Vegas, NV (KTNV)** -- A tentative budget for the 2012-2013 fiscal year was approved by the Clark County School District Board of Trustees Wednesday.

The slightly more than $2 billion budget shows $35 million in federal budget cuts.

The first draft shows also about a $64 million deficit. CCSD says they can reduce the deficit to $3 million if concessions are made by the Clark County Education Association (CCEA), otherwise known as the teachers union.

At this point, CCEA has not been willing to make any concessions and wants the district to honor contracts with teachers, which includes potential raises.

The CCEA claims the district has money to fix the giant deficit and has even offered to help pay half the costs for an independent audit.

However, the school district says they'll likely make cuts in staffing if the teachers union doesn't cooperate.

About 90% of the district's budget goes towards salaries and benefits.

The district says they've cut about $150 million in operating costs from last year.

Superintendent Dwight Jones said in Wednesday's board meeting that this budget is, "Very tentative."

A lot hangs on an arbitration meeting between the district and the teachers union at the end of April.

A final budget proposal will likely be made in mid-May. A final budget is due to the State of Nevada on June 8, 2012.

The new fiscal year begins July 1, 2012.

**Find this article at:**
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# EXHIBIT 41

Updated: 11:14 p.m. Friday, Sept. 24, 2010 | Posted: 11:13 p.m. Friday, Sept. 24, 2010

# Lawyers for executed man's family ask for hearing in Travis County

## Judge asked to review whether man was wrongly convicted of arson murder in deaths of daughters in Corsicana.

### Related

By Steven Kreytak

AMERICAN-STATESMAN STAFF

Setting the stage for what could be an extraordinary court inquiry into whether Texas executed an innocent man, lawyers for relatives of Cameron Todd Willingham, put to death for the 1991 arson murder of his three young daughters in Corsicana, on Friday petitioned a judge in Travis County to hold a hearing on whether Willingham was wrongly convicted.

The lawsuit was filed with state District Judge Charlie Baird, who last year issued the state's first posthumous DNA exoneration in a rape case originally tried in Lubbock. Baird is a trial judge who previously had nothing to do with the Lubbock or Willingham cases.

Willingham's execution six years ago has received national attention. Several arson experts in recent years have rejected the science that the investigators who testified at Willingham's trial used to determine that the fire that killed his daughters was intentionally set.

The Texas Forensic Science Commission began reviewing the Willingham case in 2006 but has not reached any conclusions. Williamson County District Attorney John Bradley, the chairman of that commission since last year, said in an interview Friday that Baird does not have the legal authority to consider the Willingham case. "I would say the political end for this one is to abolish the death penalty," Bradley said.

In a later e-mail, Bradley suggested that the Willingham family lawyers improperly filed the case directly with a judge who he said "has no public to hold him accountable" because he isn't running for re-election. Baird is a Democrat whose term on the 299th District Court expires at the end of the year.

Baird agreed last year to hear the Lubbock case, centered on the wrongful conviction of Timothy Cole, who died in prison, under a provision of the Texas Constitution that states, "All courts shall be open, and every person for an injury done him in his \u2026 reputation shall have remedy by due course of law."

The Willingham lawsuit was filed in part under a similar legal claim.

It also asks that Baird open what is called a court of inquiry in the case to determine whether probable cause exists to charge Texas officials with official oppression. The suit claims that those officials, who were not named, committed that crime by failing to consider before Willingham's execution that he was convicted on discredited arson science.

"We are not looking or asking for anything other than a fair and impartial review of the facts and the law in this case," said San Antonio lawyer Gerald Goldstein, who represents Willingham's relatives along with former Texas Gov. Mark White and Barry Scheck, co-founder of the Innocence Project.

Baird said he would hold an evidentiary hearing on the case next month if, after reviewing the filing, he deems the case worthy.

Willingham was convicted of murder in 1992 in the deaths of his children —1-year-old twins Karmon and Kameron and 2-year-old Amber — who died of smoke inhalation after a fire at the family's house in Corsicana, about 55 miles northeast of Waco. He maintained his innocence until his 2004 execution.

Willingham's lawyers said they first presented claims that he was convicted on faulty scientific arson theories to the office of Gov. Rick Perry in the days before his execution.

Since 2006, they have pursued their case with the Forensic Science Commission, whose hired expert last year issued a report identifying numerous scientific shortcomings in the Willingham fire investigation.

At a meeting this month, members of the commission wrestled with the scope of their investigation.

Bradley had supported a draft report that said investigators of the Corsicana fire could not be held accountable for relying on arson indicators now known to be unreliable or misleading because they were following the best available practices of the time.

But some of the commission's scientists said they wanted to look at other issues, including whether the state fire marshal's office, which investigates fires statewide, has a duty to reopen cases once it realizes that earlier investigative practices have been debunked by scientific advancements.

The commission has agreed to convene a panel of fire experts at a November meeting.

The Willingham family's 62-page suit was filed with hundreds of pages of exhibits and indicates that copies have been delivered to Perry's office, the state fire marshal's office, the Navarro County district attorney's office and the office of the state prosecuting attorney, which represents the state in cases at the Court of Criminal Appeals.

It is unclear whether officials in those offices would be made to participate in the inquiry or what a hearing in Baird's court on the Willingham case would entail.

Perry has called Willingham a "monster" and said he believes he is guilty; the fire marshal's office has stood by its original determination that Willingham's house was torched intentionally. A Perry spokeswoman on Friday noted in a statement that Willingham's conviction had been upheld by courts nine times.

Goldstein declined to say whether he planned to seek to subpoena any officials if Baird agrees to hold a hearing.

The February 2009 hearing on the Cole case lasted two days and included testimony from Michele Mallin, the woman whom Cole was convicted of raping, and Jerry Johnson, a prison inmate serving a life term who said he was the one who raped Mallin and was implicated in a later DNA test.

Lawyers for the Innocence Project of Texas questioned the witnesses. No one cross-examined them.

In the Willingham case, Corsicana officials have said they stand by their investigation and conclusions and say they continue to believe he was guilty. Willingham's trial defense lawyer also has said he believes his former client was guilty.

If Baird holds a hearing in October, it would come before the Texas gubernatorial election pitting Perry, a Republican, against Democratic challenger Bill White, a former Houston mayor. Election Day is Nov. 2.

Willingham was executed during Perry's tenure, and Perry was accused of playing politics with the case last year when he replaced three members of the nine-member Commission on Forensic Science, including the chairman, Austin defense lawyer Sam Bassett.

The members, whose terms had expired, were replaced just days before the commission had been scheduled to hear the findings of the expert they had hired to evaluate the case. That presentation was postponed indefinitely.

skreytak@statesman.com; 912-2946

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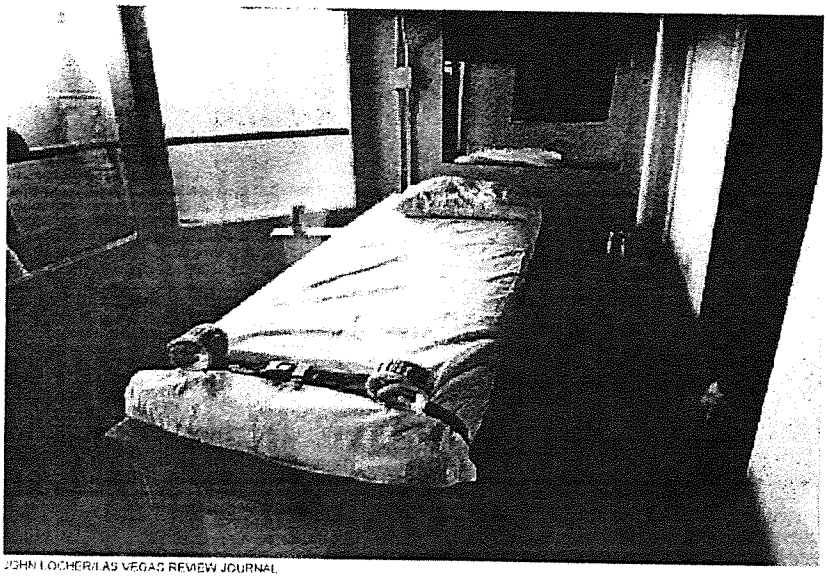
# EXHIBIT 42

Posted May 22, 2013 - 10:07am Updated May 23, 2013 - 12:41am

# Panel rejects construction of a new Nevada execution chamber



JOHN LOCHER/LAS VEGAS REVIEW-JOURNAL

The execution chamber at the now-closed Nevada State Prison in Carson City is shown here in 2005. Lawmakers have decided to not fund construction of a new execution chamber at Ely State Prison.

By SEAN WHALEY
LAS VEGAS REVIEW-JOURNAL CAPITAL BUREAU

CARSON CITY — A panel of lawmakers decided Wednesday not to fund construction of a new $700,000 execution chamber at Ely State Prison.

The decision was made by a joint Assembly Ways and Means and Senate Finance subcommittee when it voted to approve a $104 million capital improvement program for the upcoming two-year budget that begins July 1.

The vote was unanimous, and lawmakers did not comment.



In reviewing the project in past meetings, several lawmakers questioned the need for the new execution chamber. They asked why the current facility at the now shuttered Nevada State Prison in the capital could not be used instead if an execution is scheduled in the next two years.

Corrections Department Director Greg Cox said the current chamber, an old gas chamber that has been used for lethal injections, is not compliant with the Americans With Disabilities Act.

Cox said in previous testimony that he would expect litigation to be filed challenging the use of the chamber if an execution was to go forward.

There is no elevator access, so a disabled inmate facing execution would have to be carried to the "last night" cell across from the chamber.

The viewing area is cramped and provides little room for official witnesses, media representatives, a religious leader, the victims' family members, attorneys and others who choose to or are required to attend executions.

Cox said any new execution chamber probably would face litigation too but not to the degree the existing facility would see from the federal public defender's office.

But he acknowledged the old chamber could be used if necessary.

Nevada's 83-inmate death-row population is housed at Ely, 302 miles east of the capital.

Cox said the project is needed to follow state law.

Ely is an appropriate location because that is where the death row population is housed.

The last execution, by lethal injection, occurred at the Nevada State Prison on April 26, 2006, when Daryl Mack was put to death.

Mack was executed for the rape and murder of a Reno woman, Betty Jane May, in 1988.

Contact Capital Bureau reporter Sean Whaley at swhaley@reviewjournal.com or 775-687-3900.

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# EXHIBIT 43

121 Nev. 142
Supreme Court of Nevada.

John LANGON, Appellant,
v.
Julia MATAMOROS, an Individual, Respondent.

No. 42153. | May 26, 2005.

**Synopsis**
**Background:** Motorist brought personal-injury action arising from automobile accident. Following a jury trial, the Second Judicial District Court, Washoe County, James W. Hardesty, J., entered judgment in favor of alleged tortfeasor and denied motorist's motion for new trial. Motorist appealed.

**[Holding:]** The Supreme Court, Maupin, J., held that statute mandating that conviction of a crime resulting in injury to the victim is conclusive evidence of civil liability for the injury does not apply to misdemeanor traffic offenses.

Affirmed.

West Headnotes (7)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Construction of a statute is a question of law, which Supreme Court reviews de novo.

[2] **Appeal and Error**
Refusal of new trial

Supreme Court reviews an order denying a motion for a new trial for abuse of discretion.

1 Cases that cite this headnote

[3] **Appeal and Error**
On motion for judgment notwithstanding verdict

Order denying judgment notwithstanding the verdict (JNOV) is not appealable.

[4] **Judgment**
Civil or criminal proceedings

Statute mandating that conviction of a crime resulting in injury to the victim is conclusive evidence of civil liability for the injury does not apply to misdemeanor traffic offenses. West's NRSA 41.133.

5 Cases that cite this headnote

[5] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

Supreme Court ascribes the plain meaning to a statute that is not ambiguous.

[6] **Statutes**
Language and intent, will, purpose, or policy

When the statutory language fails to address an issue impliedly affected by the statute, legislative intent controls.

[7] **Statutes**
Intent

**Statutes**
Policy considerations; public policy

Supreme Court looks to reason and public policy to discern legislative intent.

**Attorneys and Law Firms**

**1077 E. Sue Saunders, Reno, for Appellant.

Turner & Riddle and Karl H. Smith, Reno, for Respondent.

Before MAUPIN, DOUGLAS and PARRAGUIRRE, JJ.

Next

Opinion

*143 *OPINION*

MAUPIN, J.

In this appeal, we consider whether NRS 41.133, which mandates that conviction of a crime resulting in injury to the victim is conclusive evidence of civil liability for the injury, applies to misdemeanor traffic violations.

*FACTS AND PROCEDURAL HISTORY*

Appellant John Langon and respondent Julia Matamoros were involved in an automobile accident, as a result of which police issued Matamoros a citation for failure to yield the right of way. Matamoros ultimately pleaded no contest, forfeited bail and paid a fine in connection with the citation.

Langon sued Matamoros for personal injuries under a negligence theory of recovery and proceeded to trial. The jury returned a verdict in favor of Matamoros, and the district court entered judgment accordingly. The district court then denied Langon's motion for judgment notwithstanding the verdict and in the alternative for a new trial. Langon appeals from the judgment and order denying his post-trial motions.

*DISCUSSION*

[1] [2] [3] The construction of a statute is a question of law, which we review de novo.[1] **1078 We review an order denying a motion for a new trial for abuse of discretion.[2]

*NRS 41.133 civil liability*

[4] Langon argues that, under NRS 41.133, Matamoros' conviction pursuant to a no contest plea and forfeiture of bail for failure to yield is admissible as conclusive evidence that she is liable for his injuries. Accordingly, Langon argues that the district court erred in denying his post-trial motions. Matamoros asserts that her plea of no contest did not result in a judgment of conviction of a *144 "crime" for the purposes of NRS 41.133. We agree with Matamoros and hold that NRS 41.133 does not apply to misdemeanor traffic offenses.[3]

[5] [6] [7] We ascribe the plain meaning to a statute that is not ambiguous.[4] When " 'the statutory language ... fails to address [an] issue [impliedly affected by the statute],' " legislative intent controls.[5] "We look to reason and public policy to discern legislative intent."[6] Because the scope of NRS 41.133 is inherently unclear, particularly in relation with other statutory measures governing tort liability, and because a literal reading of the measure would result in consequences unintended by the Legislature, we must undertake an examination of the Legislature's intent with regard to its enactment.

NRS 41.133 states: "If an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."

The Legislature enacted NRS 41.133 from a group of victims' rights bills, which included a companion measure that prohibited a convicted offender from suing victims for injuries sustained during the commission of sexual assault, kidnapping, arson, robbery, burglary, sexual molestation and criminal homicide.[7] The bill was approved and signed by the Governor, and the companion provision became NRS 41.135.[8] The separation of the companion provision as NRS 41.135, from the text of the bill that eventually became NRS 41.133, resulted from an administrative act of revision not performed by the Legislature. The crimes of violence originally enumerated in the bill draft that became NRS 41.135 reflected *145 malum in se offenses that legislators clearly intended NRS 41.133 to include; nothing in the legislative history indicates that legislators contemplated that malum in prohibitum offenses such as traffic violations would be considered crimes for the purposes of the overall measure.[9] We therefore conclude that NRS 41.133 does not apply to misdemeanor violations of state and local traffic codes.

Moreover, the application of NRS 41.133 to misdemeanor traffic violations would directly **1079 conflict with NRS 41.141, Nevada's comparative negligence statute, thus thwarting a more specific legislative purpose.[10] First, NRS 41.141 insulates a defendant from liability in cases in which a plaintiff's comparative negligence exceeds that "of the parties to the action against whom recovery is sought."[11] Second, NRS 41.141 reduces the extent of the defendant's liability when the comparative negligence of the plaintiff is found

to be less than 51 percent of the total causal negligence. If NRS 41.133 were applied as Langon suggests, discretionary police decisions to issue traffic citations, regardless of potential evidence of comparative negligence, would serve to conclusively override the basic statutory construct governing the law of negligence. Such an approach would render the comparative negligence scheme of NRS 41.141 meaningless in this context.

***Remaining assignments of error***

Langon asserts that the district court erred in rejecting his proposed jury instruction on negligence per se. He further contends that the district court abused its discretion in refusing to allow the police officer who responded to the scene to testify as an expert, admitting a letter by Langon's treating chiropractor, and admitting Langon's employment records. We have considered these arguments and conclude that they lack merit.

## *CONCLUSION*

Because NRS 41.133 does not apply to misdemeanor traffic offenses, convictions entered upon traffic citations may not be used to conclusively establish civil liability. We therefore affirm the judgment below and the order denying post-trial motions.

DOUGLAS and PARRAGUIRRE JJ., concur.

**Parallel Citations**

111 P.3d 1077

Footnotes

1 *White v. Continental Ins. Co.*, 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003).

2 *Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). The order denying judgment notwithstanding the verdict is not appealable. *Id.*

3 In *Mendez v. Brinkerhoff*, 105 Nev. 157, 771 P.2d 163 (1989), this court held that forfeiture of bail in connection with a traffic citation was not admissible in a civil proceeding as an admission that the cited party committed the charged traffic offense. Although *Mendez* was decided after the enactment of NRS 41.133, we did not determine whether the statute applied because, at least ostensibly, the events in question pre-dated the statute's effective date.

4 *Crestline Inv. Group v. Lewis*, 119 Nev. 365, 368, 75 P.3d 363, 365 (2003).

5 *Id.* (quoting *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002)).

6 *State v. Catanio*, 120 Nev.1030, ——, 102 P.3d 588, 590 (2004).

7 *See* A.B. 268, 63d Leg. (Nev.1985).

8 The Legislature amended NRS 41.135 in 1997 to state that a person who is convicted of committing or attempting to commit a felony, an act that would have been a felony if committed by an adult, or a misdemeanor or gross misdemeanor that constitutes domestic violence, may not bring an action against the victim for injuries or property damage the offender suffered. 1997 Nev. Stat., ch. 476, § 17, at 1811.

9 *See, e.g., State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293–94, 995 P.2d 482, 485 (2000) (noting that when a statute is ambiguous, the court should examine legislative history and intent); *Nunez v. Sahara Nevada Corp.*, 677 F.Supp. 1471, 1473 (D.Nev.1988) (considering a statute's meaning in the context of a larger statutory scheme).

10 *See SIIS v. Surman*, 103 Nev. 366, 367–68, 741 P.2d 1357, 1359 (1987).

11 *See also Buck v. Greyhound Lines*, 105 Nev. 756, 783 P.2d 437 (1989).

# EXHIBIT 44

98 S.Ct. 2954
Supreme Court of the United States

Sandra LOCKETT, Petitioner,
v.
State of OHIO.

No. 76-6997. | Argued Jan. 17, 1978. | Decided July 3, 1978.

Defendant was convicted in the trial court of aggravated murder and of aggravated robbery and was sentenced to death. The Ohio Court of Appeals, Summit County, affirmed, and defendant appealed. The Ohio Supreme Court, 49 Ohio St.2d 48, 358 N.E.2d 1062, affirmed, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that: (1) prosecutor's references in closing remarks to State's evidence as "unrefuted" and "uncontradicted" did not violate defendant's Fifth and Fourteenth Amendment rights; (2) exclusion of prospective jurors who indicated they could not be trusted to abide by existing law due to their convictions concerning the death penalty was proper; (3) defendant was given adequate notice of meaning of statute under which she was convicted, and (4) Ohio death penalty statute did not permit type of individualized consideration of mitigating factors required by Eighth and Fourteenth Amendments in capital cases.

Judgment reversed to the extent that it sustained imposition of death penalty and case remanded.

Mr. Justice Blackmun filed an opinion concurring in part and concurring in the judgment.

Mr. Justice Marshall filed an opinion concurring in the judgment.

Mr. Justice Rehnquist filed an opinion concurring in part and dissenting in part.

For separate opinion of Mr. Justice White concurring in part and dissenting in part, see 98 S.Ct. 2981.

West Headnotes (6)

[1] **Constitutional Law**
⚭Prosecutor

**Criminal Law**
⚭Reference to Evidence as Uncontradicted as Comment on Failure to Testify

Where defendant's counsel clearly focused jury's attention on defendant's silence first by outlining her contemplated defense in his opening statement and by then stating to court and jury near close of case that defendant would be the "next witness," even though defendant did not testify, prosecutor's references in closing remarks to State's evidence as "unrefuted" and "uncontradicted" did not constitute comment on defendant's failure to testify and did not violate defendant's Fifth and Fourteenth Amendment rights. U.S.C.A.Const. Amends. 5, 14.

233 Cases that cite this headnote

[2] **Jury**
⚭Punishment Prescribed for Offense

Where each of four excluded veniremen made it unmistakably clear that they could not be trusted to abide by existing law and to follow conscientiously instructions of trial judge due to their opposition to capital punishment, they were properly excluded from jury. U.S.C.A.Const. Amends. 6, 14.

287 Cases that cite this headnote

[3] **Criminal Law**
⚭Principals, Aiders, Abettors, and Accomplices in General

Where Ohio Supreme Court's construction of complicity provision of statute under which defendant was convicted was consistent with both prior Ohio law and with legislative history of statute, interpretation of provision did not deprive defendant of fair warning of crime with which she was charged. R.C.Ohio § 2923.03(A).

49 Cases that cite this headnote

[4] **Homicide**
Aiding, Abetting, or Other Participation in Offense
**Homicide**
Constitutional and Statutory Provisions
**Homicide**
Aiding, Abetting, or Other Participation in Offense

Constitution does not prohibit states from enacting felony-murder statutes or from making aiders and abettors equally responsible, as a matter of law, with principals. (Per Mr. Chief Justice Burger with three Justices concurring and three Justices concurring in the judgment.)

36 Cases that cite this headnote

[5] **Constitutional Law**
Proceedings
**Sentencing and Punishment**
Factors Related to Offense
**Sentencing and Punishment**
Offender's Character in General

Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (Per Mr. Chief Justice Burger with three Justices concurring and three Justices concurring in the judgment.) U.S.C.A.Const. Amends. 8, 14.

1027 Cases that cite this headnote

[6] **Constitutional Law**
Proceedings
**Sentencing and Punishment**
Provision Authorizing Death Penalty
**Sentencing and Punishment**
Aggravating or Mitigating Circumstances

Where Ohio death penalty statute required trial judge, once verdict of aggravated murder with specifications was returned, to impose death sentence unless one or more specified mitigating factors was present, but where statute did not permit sentencing judge to consider, as mitigating factors, defendant's lack of specific intent to cause death and defendant's role as accomplice, statute violated Eighth and Fourteenth Amendments. (Per Mr. Chief Justice Burger with three Justices concurring and three Justices concurring in the judgment.) U.S.C.A.Const. Amends. 8, 14; R.C.Ohio §§ 2929.03, 2929.04, 2929.04(B).

1240 Cases that cite this headnote

****2955 *586 *Syllabus'***

The Ohio death penalty statute provides that once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following circumstances is established by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency. Petitioner, whose conviction of aggravated murder with specifications that it was committed to escape apprehension for, and while committing or attempting to commit, aggravated robbery, and whose sentence to death were affirmed by the Ohio Supreme Court, makes various challenges to the validity of her conviction, and attacks the constitutionality of the death penalty statute on the ground, *inter alia*, that it does not give the sentencing judge a full opportunity to consider mitigating circumstances in capital cases as required by the Eighth and Fourteenth Amendments. *Held* : The judgment is reversed insofar as it upheld the death penalty and the case is remanded. Pp. 2959-2967; 2969-2972; 2972-2973; 2983-2985.

49 Ohio St.2d 48, 358 N.E.2d 1062, reversed in part and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding:

1. The prosecutor's closing references to the State's evidence as "unrefuted" and "uncontradicted" (no

evidence having been introduced to rebut the prosecutor's case after petitioner decided not to testify) did not violate the constitutional prohibitions against commenting on an accused's failure to testify, where petitioner's counsel had already focused the jury's attention on her silence by promising a defense and telling the jury that she would testify. Pp. 2959-2960.

2. The exclusion from the venire of four prospective jurors who made it "unmistakably clear" that because of their opposition to the death penalty, they could not be trusted to "abide by existing law" and to ***587** "follow conscientiously" the trial judge's instructions, *Boulden v. Holman*, 394 U.S. 478, 484, 89 S.Ct. 1138, 1142, 22 L.Ed.2d 433, did not violate petitioner's Sixth and Fourteenth Amendment rights under the principles of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, or *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690. Pp. 2959-2961.

3. Petitioner's contention that the Ohio Supreme Court's interpretation of the complicity provision of the statute under which she was convicted was so unexpected that it deprived her of fair warning of the crime with which she was charged, is without merit. The court's construction was consistent with both prior Ohio law and the statute's legislative history. P. 2961.

THE CHIEF JUSTICE, joined by Mr. Justice STEWART, Mr. Justice POWELL, ****2956** and Mr. Justice STEVENS, concluded, in Part III, that the limited range of mitigating circumstances that may be considered by the sentencer under the Ohio death penalty statute is incompatible with the Eighth and Fourteenth Amendments. Pp. 2961-2967.

(a) The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Pp. 2964-2965.

(b) The need for treating each defendant in a capital case with the degree of respect due the uniqueness of the individual is far more important than in noncapital cases, particularly in view of the unavailability with respect to an executed capital sentence of such postconviction mechanisms in noncapital cases as probation, parole, and work furloughs. P. 2965.

(c) A statute that prevents the sentencer in capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty, and when the choice is between life and death, such risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. P. 2965.

(d) The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments. Only the three factors specified in the statute can be considered in mitigation of the defendant's sentence, and once it is determined that none of those factors is present, the statute mandates the death sentence. Pp. 2965-2967.

Mr. Justice WHITE concluded that petitioner's death sentence should ***588** be vacated on the ground that the Ohio death penalty statute permits a defendant convicted of aggravated murder with specifications to be sentenced to death, as petitioner was in this case, without a finding that he intended death to result. Pp. 2983-2985.

Mr. Justice MARSHALL, being of the view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment, concurred in the judgment insofar as it vacates petitioner's death sentence, and also concurred in the judgment insofar as it affirms her conviction. Pp. 2972-2973.

Mr. Justice BLACKMUN concluded that petitioner's death sentence should be vacated on the grounds that (1) the Ohio death penalty statute is deficient in regard to petitioner, a nontriggerman charged with aiding and abetting a murder, in failing to allow consideration of the extent of petitioner's involvement, or the degree of her *mens rea*, in the commission of the homicide, and (2) the procedure provided by an Ohio Rule of Criminal Procedure giving the sentencing court full discretion to bar the death sentence "in the interests of justice" *if* the defendant pleads guilty or no contest, but no such discretion if the defendant goes to trial, creates an unconstitutional disparity of sentencing alternatives. *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138. Pp. 2969-2972.

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**Opinion**

 

*589 Mr. Chief Justice BURGER delivered the opinion of the Court with respect to the constitutionality of petitioner's conviction (Parts I and II), together with an opinion (Part III), in which Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS joined, on the constitutionality of the statute under which petitioner was sentenced to death, and announced the judgment of the Court.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth amendments **2957 by sentencing Sandra Lockett to death pursuant to a statute[1] that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery, and (2) that the murder was "committed while . . . committing, attempting to commit, or fleeing immediately after committing or attempting to commit . . . aggravated robbery." That offense was punishable by death in Ohio. See Ohio Rev.Code Ann. §§ 2929.03, 2929.04 (1975). She was also charged with aggravated robbery. The State's case against her depended largely upon the testimony of a coparticipant, one Al Parker, who gave the following account of her participation in the robbery and murder.

Lockett became acquainted with Parker and Nathan Earl Dew while she and a friend, Joanne Baxter, were in New Jersey. Parker and Dew then accompanied Lockett, Baxter, and Lockett's brother back to Akron, Ohio, Lockett's *590 home-town. After they arrived in Akron, Parker and Dew needed money for the trip back to New Jersey. Dew suggested that he pawn his ring. Lockett overheard his suggestion, but felt that the ring was too beautiful to pawn, and suggested instead that they could get some money by robbing a grocery store and a furniture store in the area. She warned that the grocery store's operator was a "big guy" who carried a "45" and that they would have "to get him real quick." She also volunteered to get a gun from her father's basement to aid in carrying out the robberies, but by that time, the two stores had closed and it was too late to proceed with the plan to rob them.

Someone, apparently Lockett's brother, suggested a plan for robbing a pawnshop. He and Dew would enter the shop and pretend to pawn a ring. Next Parker, who had some bullets, would enter the shop, ask to see a gun, load it, and use it to rob the shop. No one planned to kill the pawnshop operator in the course of the robbery. Because she knew the owner, Lockett was not to be among those entering the pawnshop, though she did guide the others to the shop that night.

The next day Parker, Dew, Lockett, and her brother gathered at Baxter's apartment. Lockett's brother asked if they were "still going to do it," and everyone, including Lockett, agreed to proceed. The four then drove by the pawnshop several times and parked the car. Lockett's brother and Dew entered the shop. Parker then left the car and told Lockett to start it again in two minutes. The robbery proceeded according to plan until the pawnbroker grabbed the gun when Parker announced the "stickup." The gun went off with Parker's finger on the trigger firing a fatal shot into the pawnbroker.

Parker went back to the car where Lockett waited with the engine running. While driving away from the pawnshop, Parker told Lockett what had happened. She took the gun from the pawnshop and put it into her purse. Lockett and *591 Parker drove to Lockett's aunt's house and called a taxicab. Shortly thereafter, while riding away in a taxicab, they were stopped by the police, but by this time Lockett had placed the gun under the front seat. Lockett told the police that Parker rented a room from her mother and lived with her family. After verifying this story with Lockett's parents, the police released Lockett and Parker. Lockett hid Dew and Parker in the attic when the police arrived at the Lockett household later that evening.

**2958 Parker was subsequently apprehended and charged with aggravated murder with specifications, an offense punishable by death, and aggravated robbery. Prior to trial, he pleaded guilty to the murder charge and agreed to testify against Lockett, her brother, and Dew. In return, the prosecutor dropped the aggravated robbery charge and the specifications to the murder charge, thereby eliminating the possibility that Parker could receive the death penalty.

Lockett's brother and Dew were later convicted of aggravated murder with specifications. Lockett's brother was sentenced to death, but Dew received a lesser penalty because it was determined that his offense was "primarily the product of mental deficiency," one of the three mitigating circumstances specified in the Ohio death penalty statute.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery (offenses which each carried a maximum penalty of 25 years' imprisonment and a maximum fine of $10,000, see Ohio Rev.Code Ann. §§ 2903.03, 2911.01, 2929.11 (1975)) if she would cooperate with the State, but she rejected the offer. Just prior to her trial, the prosecutor offered to permit her to plead guilty to aggravated murder without specifications, an offense carrying a mandatory life penalty, with the understanding that the aggravated robbery charge and an outstanding forgery charge would be dismissed. Again she rejected the offer.

*592 At trial, the opening argument of Lockett's defense counsel summarized what appears to have been Lockett's version of the events leading to the killing. He asserted the evidence would show that, as far as Lockett knew, Dew and her brother had planned to pawn Dew's ring for $100 to obtain money for the trip back to New Jersey. Lockett had not waited in the car while the men went into the pawnshop but had gone to a restaurant for lunch and joined Parker, thinking the ring had been pawned, after she saw him walking back to the car. Lockett's counsel asserted that the evidence would show further that Parker had placed the gun under the seat in the taxicab and that Lockett had voluntarily gone to the police station when she learned that the police were looking for the pawnbroker's killers.

Parker was the State's first witness. His testimony related his version of the robbery and shooting, and he admitted to a prior criminal record of breaking and entering, larceny, and receiving stolen goods, as well as bond jumping. He also acknowledged that his plea to aggravated murder had eliminated the possibility of the death penalty, and that he had agreed to testify against Lockett, her brother, and Dew as part of his plea agreement with the prosecutor. At the end of the major portion of Parker's testimony, the prosecutor renewed his offer to permit Lockett to plead guilty to aggravated murder without specifications and to drop the other charges against her. For the third time Lockett refused the option of pleading guilty to a lesser offense.

Lockett called Dew and her brother as defense witnesses, but they invoked their Fifth Amendment rights and refused to testify. In the course of the defense presentation, Lockett's counsel informed the court, in the presence of the jury, that he believed Lockett was to be the next witness and requested a short recess. After the recess, Lockett's counsel told the judge that Lockett wished to testify but had decided to accept her mother's advice to remain silent, despite her counsel's warning that, if she followed that advice, she would have no *593 defense except the cross-examination of the State's witnesses. Thus, the defense did not introduce any evidence to rebut the prosecutor's case.

The court instructed the jury that, before it could find Lockett guilty, it had to find that she purposely had killed the pawnbroker while committing or attempting to commit aggravated robbery. The jury was further charged that one who
"purposely aids, helps, associates himself or herself with another for the purpose of **2959 committing a crime is regarded as if he or she were the principal offender and is just as guilty as if the person performed every act constituting the offense. . . ."

Regarding the intent requirement, the court instructed:
"A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiescence in whatever may reasonably be necessary to accomplish the object of their enterprise. . . .

"If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide . . . . An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances."

The jury found Lockett guilty as charged.

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after "considering the nature and circumstances of the offense" and Lockett's "history, character, and condition," he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she "was under duress, coercion, or strong provocation," or (3) the *594 offense was "primarily the product of [Lockett's] psychosis or mental deficiency." Ohio Rev.Code §§ 2929.03-2929.04(B) (1975).
In accord with the Ohio statute, the trial judge requested a presentence report as well as psychiatric and psychological reports. The reports contained detailed information about Lockett's intelligence, character, and background. The psychiatric and psychological reports described her as a 21-year-old with low-average or average intelligence, and not suffering from a mental deficiency. One of the psychologists reported that "her prognosis for rehabilitation" if returned to society was

favorable. The presentence report showed that Lockett had committed no major offenses although she had a record of several minor ones as a juvenile and two minor offenses as an adult. It also showed that she had once used heroin but was receiving treatment at a drug abuse clinic and seemed to be "on the road to success" as far as her drug problem was concerned. It concluded that Lockett suffered no psychosis and was not mentally deficient.[2]

After considering the reports and hearing argument on the penalty issue, the trial judge concluded that the offense had not been primarily the product of psychosis or mental deficiency. Without specifically addressing the other two statutory mitigating factors, the judge said that he had "no alternative, whether [he] like[d] the law or not" but to impose the death penalty. He then sentenced Lockett to death.

## II

### A

[1] At the outset, we address Lockett's various challenges to the validity of her conviction. Her first contention is that the ***595** prosecutor's repeated references in his closing remarks to the State's evidence as "unrefuted" and "uncontradicted" constituted a comment on her failure to testify and violated her Fifth and Fourteenth Amendment rights. See *Griffin v. California,* 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965). We conclude, however, that the prosecutor's closing comments in this case did not violate constitutional prohibitions. Lockett's own counsel had clearly focused the jury's attention on her silence, first, by ****2960** outlining her contemplated defense in his opening statement and, second, by stating to the court and jury near the close of the case, that Lockett would be the "next witness." When viewed against this background, it seems clear that the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand.

### B

[2] Lockett also contends that four prospective jurors were excluded from the venire in violation of her Sixth and Fourteenth Amendment rights under the principles established in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *Taylor v. Louisiana,* 419 U.S. 522, 528, 95 S.Ct. 692, 696, 42 L.Ed.2d 690 (1975). We do not agree.

On *voir dire,* the prosecutor told the venire that there was a possibility that the death penalty might be imposed, but that the judge would make the final decision as to punishment. He then asked whether any of the prospective jurors were so opposed to capital punishment that "they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment" might be imposed. Four of the venire responded affirmatively. The trial judge then addressed the following question to those four veniremen:
"[D]o you feel that you could take an oath to well and truely [*sic* ] try this case . . . and follow the law, or is ***596** your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

Each of the four specifically stated twice that he or she would not "take the oath." They were excused.

In *Witherspoon,* persons generally opposed to capital punishment had been excluded for cause from the jury that convicted and sentenced the petitioner to death. We did not disturb the conviction but we held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S., at 522, 88 S.Ct., at 1777. We specifically noted, however, that nothing in our opinion prevented the execution of a death sentence when the veniremen excluded for cause make it "unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Id.,* at 522-523, n. 21, 88 S.Ct., at 1777.

Each of the excluded veniremen in this case made it "unmistakably clear" that they could not be trusted to "abide by existing law" and "to follow conscientiously the instructions" of the trial judge. *Boulden v. Holman,* 394 U.S. 478, 484, 89 S.Ct. 1138, 1142, 22 L.Ed.2d 433 (1969). They were thus properly excluded under *Witherspoon,* even assuming, *arguendo,* that *Witherspoon* provides a basis for attacking the conviction as well as the sentence in a capital case.

Nor was there any violation of the principles of *Taylor v.*

*Louisiana, supra.* In *Taylor,* the Court invalidated a jury selection system that operated to exclude a "grossly disproportionate," 419 U.S., at 525, 95 S.Ct., at 695, number of women from jury service thereby depriving the petitioner of a jury chosen from a "fair cross-section" of the community, *id.,* at 530, 95 S.Ct., at 697. Nothing in *Taylor,* however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly ***597** indicated an inability to follow the law and instructions of the trial judge.

C

[3] Lockett's final attack on her conviction, as distinguished from her sentence, merits only brief attention. Specifically she contends that the Ohio Supreme Court's interpretation of the complicity provision of ****2961** the statute under which she was convicted, Ohio Rev.Code Ann. § 2923.03(A) (1975), was so unexpected that it deprived her of fair warning of the crime with which she was charged. The opinion of the Ohio Supreme Court belies this claim. It shows clearly that the construction given the statute by the Ohio court was consistent with both prior Ohio law and with the legislative history of the statute.[3] In such circumstances, any claim of inadequate notice under the Due Process Clause of the Fourteenth Amendment must be rejected.

III

Lockett challenges the constitutionality of Ohio's death penalty statute on a number of grounds. We find it necessary to consider only her contention that her death sentence is invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime. To address her contention from the proper perspective, it is helpful to review the developments in our recent cases where we have applied the Eighth and Fourteenth Amendments to death penalty statutes. We do not write on a "clean slate."

A

Prior to *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), every State that authorized capital punishment had abandoned ***598** mandatory death penalties,[4] and instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case.[5] Mandatory death penalties had proved unsatisfactory, as the plurality noted in *Woodson v. North Carolina,* 428 U.S. 280, 293, 96 S.Ct. 2978, 2986, 49 L.Ed.2d 944 (1976), in part because juries, "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."

This Court had never intimated prior to *Furman* that discretion in sentencing offended the Constitution. See *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937); *Williams v. New York,* 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949); *Williams v. Oklahoma,* 358 U.S. 576, 585, 79 S.Ct. 421, 426, 3 L.Ed.2d 516 (1959). As recently as *McGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), the Court had specifically rejected the contention that discretion in imposing the death penalty violated the fundamental standards of fairness embodied in Fourteenth Amendment due process, *id.,* at 207-208, 91 S.Ct., at 1467, and had asserted that States were entitled to assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision." *Id.,* at 208, 91 S.Ct., at 1467.

The constitutional status of discretionary sentencing in capital cases changed abruptly, however, as a result of the separate opinions supporting the judgment in *Furman.* The question in *Furman* was whether "the imposition and carrying out of the death penalty [in the cases before the Court] constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S., at 239, 92 S.Ct., at 2727. Two Justices concluded that the Eighth Amendment prohibited the death penalty altogether and on that ground voted ***599** to reverse the judgments sustaining the death penalties. ****2962** *Id.,* at 305-306, 92 S.Ct., at 2760 (BRENNAN, J., concurring); *id.,* at 370-371, 92 S.Ct., at 2793 (MARSHALL, J., concurring). Three Justices were unwilling to hold the death penalty *per se* unconstitutional under the Eighth and Fourteenth Amendments, but voted to reverse the judgments on other grounds. In separate opinions, the three concluded that discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was "pregnant with discrimination," *id.,* at 257, 92 S.Ct., at 2735 (Douglas, J., concurring), because it permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.,* at 310, 92 S.Ct., at 2762 (STEWART, J., concurring), and because it

imposed the death penalty with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.*, at 313, 92 S.Ct., at 2764 (WHITE, J., concurring). Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman.* See,*Gregg v. Georgia,* 428 U.S. 153, 195-196, n. 47, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

Predictably,[6] the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment.[7] Some States responded to what was thought to ***600** be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases.[8] Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time, to comply with *Furman,* by providing standards to guide the sentencing decision.[9]

****2963** Four years after *Furman,* we considered Eighth Amendment ***601** issues posed by five of the post-*Furman* death penalty statutes.[10] Four Justices took the position that all five statutes complied with the Constitution; two Justices took the position that none of them complied. Hence, the disposition of each case varied according to the votes of three Justices who delivered a joint opinion in each of the five cases upholding the constitutionality of the statutes of Georgia, Florida, and Texas, and holding those of North Carolina and Louisiana unconstitutional.

The joint opinion reasoned that, to comply with *Furman,* sentencing procedures should not create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia, supra,* 428 U.S., at 188, 96 S.Ct., at 2932. In the view of the three Justices, however, *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," 428 U.S., at 189, 96 S.Ct., at 2932, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases IN WHICH IT IS IMPOSED FROM . . . THE MANY CASES IN WHICH IT IS NOT." *id.,* at 188, 96 S.Ct., at 2932. The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson v. North Carolina,* 428 U.S., at 304, 96 S.Ct., at 2991, in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case." *Id.,* at 305, 96 S.Ct., at 2991; see *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 637, 97 S.Ct. 1993, 1996, 52 L.Ed.2d 637 (1977); *Jurek v. Texas,* 428 U.S. 262, 271-272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976).

***602** In the last decade, many of the States have been obliged to revise their death penalty statutes in response to the various opinions supporting the judgments in *Furman* and *Gregg* and its companion cases. The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.

**B**

With that obligation in mind we turn to Lockett's attack on the Ohio statute. Essentially she contends that the Eighth and Fourteenth Amendments require that the sentencer be given a full opportunity to consider mitigating circumstances in capital cases and that the Ohio statute does not comply with that requirement. She relies, in large part, on the plurality opinions in *Woodson, supra,* 428 U.S., at 303-305, 96 S.Ct., at 2990-2991, and *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325, 333-334, 96 S.Ct. 3001, 3006, 49 L.Ed.2d 974 (1976), and the joint opinion in *Jurek, supra,* 428 U.S., at 271-272, 96 S.Ct., at 2956, but she goes beyond them.

[4] We begin by recognizing that the concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See *Williams v. New York,* 337 U.S., at 247-248, 69 S.Ct., at 1083; *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S., at 55, 58 S.Ct., at 60. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account. That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or ****2964** to enact felony-murder statutes is beyond constitutional challenge. But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. See *ibid.*; *Williams v. New York, supra,* at 247-248, 69 S.Ct., at 1083; *Williams v. Oklahoma,* 358 U.S., at 585, 79 S.Ct.,

at 426. And where sentencing discretion is granted, it generally *603 has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant-*if not essential*-[to the] selection of an appropriate sentence . . .." *Williams v. New York, supra,* 337 U.S., at 247, 69 S.Ct., at 1083 (emphasis added).

The opinions of this Court going back many years in dealing with sentencing in capital cases have noted the strength of the basis for individualized sentencing. For example, Mr. Justice Black, writing for the Court in *Williams v. New York, supra*, at 247-248, 69 S.Ct., at 1083-a capital case-observed that the
"whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions-even for offenses today deemed trivial."

Ten years later, in *Williams v. Oklahoma, supra*, 358 U.S., at 585, 79 S.Ct., at 426, another capital case, the Court echoed Mr. Justice Black, stating that
"[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required*, to consider all of the mitigating and aggravating circumstances involved in the crime." (Emphasis added.)

See also *Furman v. Georgia*, 408 U.S., at 245-246, 92 S.Ct., at 2729-2730 (Douglas, J., concurring); *id.*, at 297-298, 92 S.Ct., at 2756 (BRENNAN, J., concurring); *id.*, at 339, 92 S.Ct., at 2777 (MARSHALL, J., concurring); *id.*, at 402-403, 92 S.Ct., at 2810 (BURGER, C. J., dissenting); *id.*, at 413, 92 S.Ct., at 2815 (BLACKMUN, J., dissenting); *McGautha v. California*, 402 U.S., at 197-203, 91 S.Ct., at 1462-1465. Most would agree that "the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process." *Furman v. Georgia, supra*, 408 U.S., at 402, 92 S.Ct., at 2810 (BURGER, C. J., dissenting).

Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in *Woodson*, after *604 reviewing the historical repudiation of mandatory sentencing in capital cases, 428 U.S., at 289-298, 96 S.Ct., at 2984-2988, concluded that
"in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304, 96 S.Ct., at 2991.

That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id.*, at 305, 96 S.Ct., at 2991. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." *Id.*, at 304, 96 S.Ct., at 2991. The plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed "relevant" in capital sentencing or what degree of consideration of "relevant facets" it would require.

[5] We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[11] not be precluded from considering, **2965 *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[12] We recognize that, in noncapital *605 cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques-probation, parole, work furloughs, to name a few-and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.[13]

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation

creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

***606 C**

[6] The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases. Its constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg, Proffitt*, and *Jurek*.

In upholding the Georgia statute in *Gregg*, Justices STEWART, POWELL, and STEVENS noted that the statute permitted the jury "to consider any aggravating or mitigating circumstances," see *Gregg*, 428 U.S., at 206, 96 S.Ct., at 2941, and that the Georgia Supreme Court had approved "open and far-ranging argument" in presentence hearings, *id.*, at 203, 96 S.Ct., at 2939.[14] Although the Florida statute approved in *Proffitt* contained a list of mitigating factors, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was ****2966** not exclusive.[15] *Jurek* involved a Texas statute which made no explicit reference to mitigating factors. 428 U.S., at 272, 96 S.Ct., at 2956. Rather, the jury was required to answer three ***607** questions in the sentencing process, the second of which was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex.Code Crim.Proc., Art. 37.071(b) (Supp.1975-1976); see 428 U.S., at 269, 96 S.Ct., at 2955. The statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question-despite its facial narrowness-so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show. *Id.*, at 272-273, 96 S.Ct., at 2955 (opinion of STEWART, POWELL, and STEVENS, JJ.), citing and quoting, *Jurek v. State*, 522 S.W.2d 934, 939-940 (Tex.Crim.App.1975). None of the statutes we sustained in *Gregg* and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

In this regard the statute now before us is significantly different. Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the sentencing judge determines that at least one of the following mitigating circumstances is established by a preponderance of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev.Code Ann. § 2929.04(B) (1975).

***608** The Ohio Supreme Court has concluded that there is no constitutional distinction between the statute approved in *Proffitt*, and Ohio's statute, see *State v. Bayless*, 48 Ohio St.2d 73, 86-87, 357 N.E.2d 1035, 1045-1046 (1976), because the mitigating circumstances in Ohio's statute are "liberally construed in favor of the accused." *State v. Bell*, 48 Ohio St.2d 270, 281, 358 N.E.2d 556, 563 (1976); see *State v. Bayless, supra*, 48 Ohio St.2d, at 86, 357 N.E.2d, at 1046, and because the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established, *State v. Bell, supra*, 48 Ohio St.2d, at 281, 358 N.E.2d, at 564. But even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence. See, 48 Ohio St.2d, at 281-282, 358 N.E.2d, at 564-565; *State v. Bayless, supra*, 48 Ohio St.2d, at 87 n. 2, 357 N.E.2d, at 1046 n. 2. We see, therefore, that once it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is ****2967** relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a

death penalty statute must not preclude consideration of relevant mitigating factors.
Accordingly, the judgment under review is reversed to the *609 extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.[16]
*So ordered.*

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

## APPENDIX TO OPINION OF THE COURT

The pertinent provisions of the Ohio death penalty statute, Ohio Rev.Code Ann. (1975), are as follows:

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not *610 guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. **2968 Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a *611 statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

***612** (4) The offense was committed while the offender was s a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental ***2969** deficiency, though such *613 condition is insufficient to establish the defense of insanity.

Mr. Justice BLACKMUN, concurring in part and concurring in the judgment.

I join the Court's judgment, but only Parts I and II of its opinion. I, too, would reverse the judgment of the Supreme Court of Ohio insofar as it upheld the imposition of the death penalty on petitioner Sandra Lockett, but I would do so for a reason more limited than that which the plurality espouses, and for an additional reason not relied upon by the plurality.

I

The first reason is that, in my view, the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea,* in the commission of the homicide. The Ohio capital penalty statute, together with that State's aiding-and-abetting statute, and its statutory definition of "purposefulness" as including reckless endangerment, allows for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally.[1] It might be that *614 to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription, incorporated in the Fourteenth Amendment, against gross disproportionality, but I doubt that the Court, in regard to murder, could easily define a convincing bright-line rule such as was used in regard to rape, *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 282 (1977), to make workable a disproportionality approach.[2]

***615 **2970** The more manageable alternative, in my view, is to follow a proceduralist tack, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing *616 authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's *mens rea.* That approach does not interfere with the States' individual statutory categories for assessing legal guilt, but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his *mens rea* in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force. Though heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures, see *Furman v. Georgia,* 408 U.S. 238, 405, 92 S.Ct. 2726, 2811, 33 L.Ed.2d 346 (1972) (dissenting opinion), adhered to in the 1976 cases, see my opinion in *Gregg v. Georgia,* 428 U.S.

153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859, 904; *Proffitt v. Florida*, 428 U.S. 242, 261, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913; *Jurek v. Texas*, 428 U.S. 262, 279, 96 S.Ct. 2950, 2960, 49 L.Ed.2d 929; *Woodson v. North Carolina*, 428 U.S. 280, 307, 96 S.Ct. 2978, 2993, 49 L.Ed.2d 944; *Roberts v. Louisiana*, 428 U.S. 325, 363, 96 S.Ct. 3001, 3020, 49 L.Ed.2d 974, this Court's judgment as to disproportionality in *Coker, supra,* in which I joined, and the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where *no* participant specifically intended the fatal use of a weapon, see n. 1, *supra,* provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.

This approach is not too far off the mark already used by many States in assessing the death penalty. Of 34 States that now have capital statutes, 18 specify that a minor degree of participation in a homicide may be considered by the ***617** sentencing authority, and, of the remaining 16 States, 9 ****2971** allow consideration of any mitigating factor.[3]

## II

The second ground on which reversal is required, in my view, is a *Jackson* issue. Although the plurality does not reach this issue, it is raised by petitioner, and I mention it against the possibility that any further revision of the Ohio death penalty statutes, prompted by the Court's decision today, contemplate as well, and cure, the *Jackson* deficiency.

In *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Court held that the capital-sentencing provision of the Federal Kidnaping Act was unconstitutional in that it needlessly burdened the defendant's exercise of the Sixth Amendment ***618** right to trial by jury and the Fifth Amendment right to plead not guilty. The Act, 18 U.S.C. § 1201(a) (1964 ed.), had provided that the death penalty could be imposed only "if the verdict of the jury shall so recommend," thus peculiarly insuring that any defendant who pleaded guilty, or who waived a jury trial in favor of a bench trial, could not be sentenced to death, and imposing the risk of death only on those who insisted on trial by jury.

The holding of *Jackson,* prohibiting imposition of the death penalty on a defendant who insists upon a jury trial, was thereafter limited to an extent by *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), where the Court held that a pre-*Jackson* defendant who had pleaded guilty rather than go to trial was not entitled to withdraw his plea on grounds of involuntariness or coercion even if the plea had been encouraged by fear of the death penalty in a jury trial. Here, of course, petitioner insisted on her right to a jury trial, and thus falls on the *Jackson* side of any *Jackson-Brady* dichotomy.

Under Ohio Rule Crim.Proc. 11(C)(3), the sentencing court has full discretion to prevent imposition of a capital sentence "in the interests of justice" *if* a defendant pleads guilty or no contest, but wholly lacks such discretion if the defendant goes to trial. The Rule states that if "the indictment contains one or more specifications [of aggravating circumstances], and a plea of guilty or no contest to the charge [of aggravated murder with specifications] is accepted, the court may dismiss the specifications and impose sentence [of life imprisonment] accordingly, in the interests of justice." Such a dismissal of aggravating specifications absolutely precludes imposition of the death penalty. There is *no* provision similar to Rule 11(C)(4) permitting the trial court to dismiss aggravating specifications "in the interests of justice" where the defendant insists on his right to trial. Instead, as the Ohio Supreme Court noted in *State v. Weind,* 50 Ohio St.2d 224, 227, 364 N.E.2d 224, 228 (1977), vacated in part and remanded, ****2972** 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156 (1978), a defendant who pleads not guilty ***619** "must rely on the court finding the presence of one of the [statutory] mitigating circumstances . . . to avoid the death sentence."

While it is true, as the Ohio Court noted in *Weind,* 50 Ohio St.2d, at 229, 364 N.E.2d, at 229, that there is always a possibility of a death sentence whether or not one pleads guilty, this does not change the fact that a defendant can plead not guilty only by enduring a semimandatory, rather than a purely discretionary, capital-sentencing provision. This disparity between a defendant's prospects under the two sentencing alternatives is, in my view, too great to survive under *Jackson,* and petitioner's death sentence thus should be vacated on that ground as well.

Mr. Justice MARSHALL, concurring in the judgment.

I continue to adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment. See *Furman v. Georgia,* 408 U.S. 238, 314-374, 92 S.Ct. 2726, 2764-2796, 33 L.Ed.2d 346 (1972) (MARSHALL, J., concurring); *Gregg v. Georgia,* 428 U.S. 153, 231-241, 96 S.Ct. 2909, 2973-2977, 49 L.Ed.2d 859 (1976)

(MARSHALL, J., dissenting). The cases that have come to this Court since its 1976 decisions permitting imposition of the death penalty have only persuaded me further of that conclusion. See, *e. g., Gardner v. Florida,* 430 U.S. 349, 365, 97 S.Ct. 1197, 1208, 51 L.Ed.2d 393 (1977) (MARSHALL, J., dissenting); *Coker v. Georgia,* 433 U.S. 584, 600-601, 97 S.Ct. 2861, 2869-2870, 53 L.Ed.2d 282 (1977) (MARSHALL, J., concurring in judgment); *Alford v. Florida,* 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978) (MARSHALL, J., dissenting from denial of certiorari). This case, as well, serves to reinforce my view.

When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren-even those who believe that the death penalty is not wholly inconsistent with the Constitution-can disagree that it must be vacated. Under the Ohio death penalty statute, this 21-year-old Negro woman was sentenced to death for a killing that she did not actually commit or intend to commit. She was convicted under a theory of vicarious liability. The ***620** imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition. *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); it makes no distinction between a willful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. See 49 Ohio St.2d 48, 67, 358 N.E.2d 1062, 1075 (1976) (dissenting opinion).

Permitting imposition of the death penalty solely on proof of felony murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other Members of the Court to join Mr. Justice BRENNAN and myself in *Furman v. Georgia, supra,* in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion), embodied in the Eighth Amendment, by reference to state "legislative judgment," see *Gregg v. Georgia, supra,* 428 U.S., at 175, 96 S.Ct., at 2926 (opinion of STEWART, POWELL, and STEVENS, JJ.).

As the plurality points out, petitioner was sentenced to death under a statutory scheme that precluded any effective consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation. Achieving the proper balance between clear guidelines that assure relative ****2973** equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon. The Ohio statute, with its blunderbuss, virtually mandatory approach to imposition of the death penalty for certain crimes, ***621** wholly fails to recognize the unique individuality of every criminal defendant who comes before its courts. See *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 637, 97 S.Ct. 1993, 1996, 52 L.Ed.2d 637 (1977) (*per curiam* ); *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

The opinions announcing the judgment of the Court in *Gregg v. Georgia,* 428 U.S., at 188-198, 96 S.Ct., at 2932-2936 (opinion of STEWART, POWELL, and STEVENS, JJ.), *Jurek v. Texas,* 428 U.S. 262, 271-276, 96 S.Ct. 2950, 2956-2958, 49 L.Ed.2d 929 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), and *Proffitt v. Florida,* 428 U.S. 242, 259-260, 96 S.Ct. 2960, 2969-2970, 49 L.Ed.2d 913 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), upheld the constitutionality of the death penalty, in the belief that a system providing sufficient guidance for the sentencing decisionmaker and adequate appellate review would assure "rationality," "consistency," and "proportionality" in the imposition of the death sentence. *Gregg v. Georgia, supra,* at 203, 96 S.Ct., at 2939; *Proffitt v. Florida, supra,* at 259, 96 S.Ct., at 2969; *Jurek v. Texas, supra,* at 276, 96 S.Ct., at 2958. That an Ohio trial court could impose the death penalty on petitioner under these facts, and that the Ohio Supreme Court on review could sustain it, cast strong doubt on the plurality's premise that appellate review in state systems is sufficient to avoid the wrongful and unfair imposition of this irrevocable penalty.

Accordingly, I join in the Court's judgment insofar as it affirms petitioner's conviction and vacates her death sentence. I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed.

***628** Mr. Justice REHNQUIST, concurring in part and dissenting in part.

I join Parts I and II of THE CHIEF JUSTICE's opinion for the Court, but am unable to join Part III of his opinion or in the judgment of reversal.

I

Whether out of a sense of judicial responsibility or a less altruistic sense of futility, there are undoubtedly circumstances which require a Member of this Court "to bow to the authority" of an earlier case despite his "original and continuing belief that the decision was constitutionally wrong." *Burns v. Richardson,* 384 U.S. 73, 98, 86 S.Ct. 1286, 1300, 16 L.Ed.2d 376 (1966) (Harlan, J., concurring in result). See also *Id.,* at 99, 86 S.Ct., at 1300 (STEWART, J., concurring in judgment). The Court has most assuredly not adopted the dissenting views which I expressed in the previous capital ***629** punishment cases, see *Woodson v. North Carolina,* 428 U.S. 280, 308, 96 S.Ct. 2978, 2993, 49 L.Ed.2d 944 (1976), and *Furman v. Georgia,* 408 U.S. 238, 465, 92 S.Ct. 2726, 2841, 33 L.Ed.2d 346 (1972). It has just as surely not cloven to a principled doctrine either holding the infliction of the death penalty to be unconstitutional *per se* or clearly and understandably stating the terms under which the Eighth and Fourteenth Amendments permit the death penalty to be imposed. Instead, as I believe both the opinion of THE CHIEF JUSTICE and the opinion of my Brother WHITE seem to concede, the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed.

THE CHIEF JUSTICE states: "We do not write on a 'clean slate,' " *ante,* at 2961. But it can scarcely be maintained that today's decision is the logical application of a ****2974** coherent doctrine first espoused by the opinions leading to the Court's judgment in *Furman,* and later elaborated in the *Woodson* series of cases decided two Terms ago. Indeed, it cannot even be responsibly maintained that it is a principled application of the plurality and lead opinions in the *Woodson* series of cases, without regard to *Furman.* The opinion strives manfully to appear as a logical exegesis of those opinions, but I believe that it fails in the effort. We are now told, in effect, that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear. I do not think THE CHIEF JUSTICE's effort to trace this quite novel constitutional principle back to the plurality and lead opinions in the *Woodson* cases succeeds.

As the opinion admits, *ante,* at 2965 n. 14, the statute upheld in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), permitted the sentencing authority to consider only those mitigating circumstances " 'authorized by law.' " *Id.,* at 164, 96 S.Ct., at 2920 (opinion of STEWART, POWELL, and STEVENS, JJ.) (citation omitted). Today's opinion goes on to say: "Although the Florida statute ***630** approved in *Proffitt* [*v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)] contained a list of mitigating factors, six Members of this Court assumed . . . that the range of mitigating factors listed in the statute was not exclusive." *Ante,* at 2966, and n. 15, citing *Proffitt, supra,* at 250 n. 8, 260, 96 S.Ct., at 2965. The footnote referred to discussed whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. The reference to the absence of limiting language with respect to the list of statutory mitigating factors was employed to emphasize the different statutory treatment of aggravating circumstances. Indeed, only one page later the joint opinion stated: "The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed." 428 U.S., at 251, 96 S.Ct., at 2966. The other *Proffitt* opinion referred to in today's opinion, the dissenting opinion of Mr. Justice WHITE, *id.,* at 260, 96 S.Ct., at 2970, said of mitigating circumstances: "[A]lthough the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered."

The opinion's effort to find support for today's rule in our opinions in *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), is equally strained. The lead opinion there read the opinion of the Texas Court of Criminal Appeals to interpret the statute "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show," *id.,* at 272, 96 S.Ct., at 2956, and went on to quote several specified types of mitigating circumstances which were mentioned in the Texas court's opinion. I think it clear from this context that the term "mitigating circumstances" was *not* so broad as to encompass any evidence which the defense attorney saw fit to present to a judge or jury.

It seems to me indisputably clear from today's opinion that, ***631** while we may not be writing on a clean slate, the Court is scarcely faithful to what has been written before. Rather, it makes a third distinct effort to address the same question, an effort which derives little support from any of the various opinions in *Furman* or from the prevailing opinions in the *Woodson* cases. As a practical matter, I doubt that today's opinion will make a great deal of difference in the manner in which trials in capital cases are conducted, since I would suspect that it has been the practice of most trial judges to permit a defendant to offer virtually any sort of evidence in his own defense as he wished. But as my Brother WHITE points out in his dissent, the theme of today's opinion, far from supporting

those views expressed in *Furman* which did appear to be carried over to the *Woodson* cases, tends to undercut those views. If a defendant as **2975 a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive of no basis upon which the jury might take it into account in imposing a sentence, the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a "mitigating circumstance," it will not guide sentencing discretion but will totally unleash it. It thus appears that the evil described by the *Woodson* plurality-that mandatory capital sentencing "papered over the problem of unguided and unchecked jury discretion," 428 U.S., at 302, 96 S.Ct., at 2990-was in truth not the unchecked discretion, but a system which "papered over" its exercise rather than spreading it on the record.

I did not, either at the time of the *Furman* decision or the decision in the *Woodson* cases, agree with the views expressed in *Furman* which I thought the lead opinions in the *Woodson* *632 cases sought to carry over into those opinions. I do, however, agree with the statements as to institutional responsibility contained in the separate opinions in *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966), and I trust that I am not insensitive to THE CHIEF JUSTICE's expressed concern in his opinion that "[t]he States now deserve the clearest guidance that the Court can provide" on capital punishment. *Ante*, at 2963. Given the posture of my colleagues in this case, however, there does not seem to me to be any way in which I can assist in the discharge of that obligation. I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years.

A majority of the Court has yet to endorse the course taken by today's plurality in using the Eighth Amendment as a device for importing into the trial of capital cases extremely stringent procedural restraints. The last opinion on that subject to command a majority of this Court was that of Mr. Justice Harlan in *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), in which he spoke for the Court in these words:
"It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). The Constitution requires no more than that trials be *633 fairly conducted and that guaranteed rights of defendants be scrupulously respected." *Id.*, at 221, 91 S.Ct., at 1474.

I continue to view *McGautha* as a correct exposition of the limits of our authority to revise state criminal procedures in capital cases under the Eighth and Fourteenth Amendments. Sandra Lockett was fairly tried, and was found guilty of aggravated murder. I do not think Ohio was required to receive any sort of mitigating evidence which an accused or his lawyer wishes to offer, and therefore I disagree with Part III of the plurality's opinion.

II

Because I reject the primary contentions offered by petitioner, I must also address her other arguments, with which the Court **2976 does not wish to deal, in order to conclude that the State may impose the death penalty. Two of petitioner's objections can be dismissed with little comment. First, she complains that the Ohio procedure does not permit jury participation in the sentencing process. As the lead opinion pointed out in *Proffitt*, 428 U.S., at 252, 96 S.Ct., at 2966, this Court "has never suggested that jury sentencing is constitutionally required." No majority of this Court has ever reached a contrary conclusion, and I would not do so today. Second, she contends that the State should be required to prove the absence of mitigating factors beyond a reasonable doubt. Because I continue to believe that the Constitution is not offended by the State's refusal to consider mitigating factors at all, there can be no infirmity in shifting the burden of persuasion to the defendant when it chooses to consider them.

Petitioner also presents two arguments based on *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), in which the Court held that the imposition of the death penalty under the Federal Kidnaping Act, 18 U.S.C. § 1201(a) (1964 ed.), was unconstitutional because it could only be imposed where

 

the defendant exercised his right to trial by jury. First, petitioner ***634** attacks the provision of the statute requiring three judges, rather than one, to hear the case when a defendant chooses to be tried by the court rather than the jury. She contends that the three judges are less likely to impose the death penalty than would be the single judge who determines sentence in the case of a jury trial. To that extent, she argues, the exercise of the right to a jury trial is discouraged because of a fear of a higher probability of the imposition of the death penalty. This argument cannot be supported. There is simply no reason to conclude that three judges are less likely than one to impose the death sentence on a convicted murderer. At the same time, it is at least equally plausible that the three judges would be less likely than a jury to convict in the first instance. Thus, at the time when an accused defendant must choose between a trial before the jury and a trial to the court, it simply cannot be said which is more likely to result in the imposition of death. Since both procedures are sufficiently fair to satisfy the Constitution. I see no infirmity in requiring petitioner to choose which she prefers.

Second, petitioner complains that the trial court has the authority to dismiss the specifications of aggravating circumstances, thus precluding the imposition of the death penalty, only when a defendant pleads guilty or no contest. She contends that this limitation upon the availability of judicial mercy unfairly penalizes her right to plead not guilty. While *Jackson* may offer some support for this contention, it certainly does not compel its acceptance. In *Jackson*, the defendant could have been executed if he exercised his right to a jury trial, but could not have been executed if he waived it. In Ohio, a defendant is subject to possible execution whether or not he pleads guilty. Furthermore, if he chooses to plead guilty, he is not subject to possible acquittal. Under such circumstances, it is difficult to imagine that any defendant will be deterred from exercising his right to go to trial. Indeed, petitioner was not so deterred, and respondent reports that ***635** no one in petitioner's county has ever pleaded guilty to capital murder. Brief for Respondent 36. The mere fact that petitioner was required to choose hardly amounts to a constitutional violation. In *McGautha, supra,* 402 U.S., at 212-213, 91 S.Ct., at 1469-1470, the Court explained an earlier decision, *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), in which it had invalidated a conviction because the defendant had been required to forego his Fifth Amendment privilege against self-incrimination to protect a Fourth Amendment claim. Here petitioner's assertion of her right to go to trial would have deprived her only of a statutory possibility of mercy, not of constitutional dimensions, enjoyed by other defendants in Ohio. Nothing in *Jackson* suggests that such a choice is forbidden by the Fourteenth Amendment.

****2977** I finally reject the proposition urged by my Brother WHITE in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother WHITE concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." 438 U.S., at 625, 98 S.Ct., at 2983. Centuries of common-law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against ***636** cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Since all of petitioner's claims appear to me to be without merit, I would affirm the judgment of the Supreme Court of Ohio.

**Parallel Citations**

98 S.Ct. 2954, 57 L.Ed.2d 973, 9 O.O.3d 26

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The pertinent provisions of the Ohio death penalty statute appear as an appendix to this opinion.

 

2 The presentence report also contained information about the robbery. It indicated that Dew had told the police that he, Parker, and Lockett's brother had planned the holdup. It also indicated that Parker had told the police that Lockett had not followed his order to keep the car running during the robbery and instead had gone to get something to eat.

3 See 49 Ohio St.2d 48, 58-62, 358 N.E.2d 1062, 1070-1072 (1976); *id.*, at 69-70, 358 N.E.2d, at 1076 (Stern, J., dissenting).

4 See *Woodson v. North Carolina*, 428 U.S. 280, 291-292, and n. 25, 96 S.Ct. 2978, 2984-2985, 49 L.Ed.2d 944 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

5 See *id.*, at 291-292, 92 S.Ct., at 2753; *McGautha v. California*, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463, 28 L.Ed.2d 711 (1971).

6 See *Furman v. Georgia*, 408 U.S. 238, 403, 92 S.Ct. 2726, 2810, 33 L.Ed.2d 346 (1972) (BURGER, C. J., dissenting).

7 The limits on the consideration of mitigating factors in Ohio's death penalty statute which Lockett now attacks appear to have been a direct response to *Furman*. Prior to *Furman*, Ohio had begun to revise its system of capital sentencing. The Ohio House of Representatives had passed a bill abandoning the practice of unbridled sentencing discretion and instructing the sentencer to consider a list of aggravating and mitigating circumstances in determining whether to impose the death penalty. The list of mitigating circumstances permitted consideration of any circumstance "tending to mitigate the offense, though failing to establish a defense." See Sub. House Bill 511, 109th Ohio General Assembly § 2929.03(C)(3), passed by the Ohio House on March 22, 1972; Lehman & Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve.St.L.Rev. 8, 10, 16 (1974). *Furman* was announced during the Ohio Senate Judiciary Committee's consideration of the Ohio House bill. After *Furman*, the Committee decided to retain the death penalty but to eliminate much of the sentencing discretion permitted by the House bill. As a result, the Ohio Senate developed the current sentencing procedure which requires the imposition of the death penalty if one of seven specific aggravating circumstances and none of three specific mitigating circumstances is found to exist. Confronted with what reasonably would have appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after *Furman*, the sponsors of the Ohio House bill were not in a position to mount a strong opposition to the Senate's amendments, see Lehman & Norris, *supra*, at 18-22, and the statute under which Lockett was sentenced was enacted.

8 See, *e. g.*, *Woodson, supra*, 428 U.S., at 300, 96 S.Ct., at 2989 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Rockwell v. Superior Court*, 18 Cal.3d 420, 446-448, 134 Cal.Rptr. 650, 665-667, 556 P.2d 1101, 1116-1118 (1976) (Clark, J., concurring) (account of how California and other States enacted unconstitutional mandatory death penalties in response to *Furman* ); *State v. Spence*, 367 A.2d 983, 985-986 (Del.Supr.1976) (Delaware Legislature and court interpreted *Furman* as requiring elimination of all sentencing discretion resulting in an unconstitutional statute); Liebman & Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor, 66 Geo.L.J. 757, 765 n. 43 (1978).

9 See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv.L.Rev. 1690, 1690-1710 (1974).

10 *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina, supra;* and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

11 We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner-or escapee-under a life sentence is found guilty of murder. See *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 n. 5, 97 S.Ct. 1993, 1996, 52 L.Ed.2d 637 (1977).

12 Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

13 Sentencing in noncapital cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes.

14 The statute provided that, in sentencing, the jury should consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law" in addition to 10 specified aggravating circumstances. See Ga.Code Ann. § 27.2534.1(b) (Supp.1975). Mr. Justice WHITE, who also voted to uphold the statute in an opinion joined by THE CHIEF JUSTICE and Mr. Justice REHNQUIST, noted that the Georgia Legislature had decided to permit "the jury to dispense mercy on the basis of factors

too intangible to write into a statute." *Gregg*, 428 U.S., at 222, 96 S.Ct., at 2947.

15 The opinion of Justices STEWART, POWELL, and STEVENS in *Proffitt* noted that the Florida statute "provides that '[a]ggravating circumstances shall be *limited* to . . . [eight specified factors]' " and that there was "no such limiting language introducing the list of statutory mitigating factors." 428 U.S., at 250 n. 8, 96 S.Ct., at 2966 n. 8. Mr. Justice WHITE, joined by THE CHIEF JUSTICE and Mr. Justice REHNQUIST, accepted the interpretation of the statute contained in the opinion of Justices STEWART, POWELL, and STEVENS. See *id.*, at 260, 96 S.Ct., at 2970.

16 In view of our holding that Lockett was not sentenced in accord with the Eighth Amendment, we need not address her contention that the death penalty is constitutionally disproportionate for one who has not been proved to have taken life, to have attempted to take life, or to have intended to take life, or her contention that the death penalty is disproportionate as applied to her in this case. Nor do we address her contentions that the Constitution requires that the death sentence be imposed by a jury; that the Ohio statutory procedures impermissibly burden the defendant's exercise of his rights to plead not guilty and to be tried by a jury; and that it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases.

1 Ohio Rev.Code Ann. § 2903.01(B) (1975) provides that "[n]o person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated robbery," and § 2903.01(C) states that one doing so is guilty of aggravated murder. Under § 2929.04(A)(7), the commission of the same armed robbery serves as an aggravating specification to the murder and requires the imposition of the death penalty upon the principal offender unless the existence of one of the three permitted mitigating circumstances is established by a preponderance of the evidence. Sections 2923.03(A) and (F) provide that an aider or abettor who acts "with the kind of culpability required for the commission of [the principal] offense" shall be "prosecuted and punished as if he were a principal offender." The finishing stroke is then delivered by Ohio's statutory definition of "purpose." Under § 2901.22(A), "[a] person acts purposely when it is his specific intention to cause a certain result, or, *when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.*" (Emphasis added.)
In this case, as the three dissenting justices of the Ohio Supreme Court noted, 49 Ohio St.2d 48, 68, 358 N.E.2d 1062, 1075 (1976), the jury was instructed that Lockett could be found to have "purposely" aided a murder merely by taking part in a robbery in which the threat of force was to be employed. The jury was instructed: "If the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide, even though the aider and abettor was not aware of the particular weapon used to accomplish the killing."
The State presented no testimony indicating any prior plan actually to fire the gun in the course of the robbery. The triggerman, Parker, testified that the gun discharged accidentally when the proprietor of the pawnshop grabbed at it. App. 50-51, 53.

2 I do not find entirely convincing the disproportionality rule embraced by my Brother WHITE. The rule that a defendant must have Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," *post,* at 2985, transforms the culpability of those defendants' actions?
Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?
The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite *mens rea,* involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of *mens rea.*
Finally, I must question the data relied upon by my Brother WHITE in concluding, *post,* at 2983, that only "extremely rare[ly]" has the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accepted uncritically, was merely that, of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"-not that the defendant had actual intention to kill. App. to Brief for Petitioner 1b. Of contemporary death penalty statutes, my Brother WHITE concedes that approximately half permit the execution of persons who did not actually intend to cause death.

3 The 18 state statutes specifically permitting consideration of a defendant's minor degree of involvement are Ala. Code, Tit. 13, § 13-11-7(4) (1975); Ariz.Rev.Stat.Ann. § 13-454(F)(3) (Supp.1977); Ark.Stat.Ann. § 41-1304(5) (1977); Cal. Penal Code Ann. § 190.3(i) (West Supp.1978); Fla.Stat. § 921.141(6)(d) (Supp.1978); Ind. Code § 35-50-2-9(c)(4) (Supp.1977); Ky.Rev.Stat. § 532.025(2)(b)(5) (Supp.1977); La. Code Crim.Proc., Art. 905.5(g) (West Supp.1978); Mo.Rev.Stat. § 565.012.3(4) (Supp.1978); Mont.Rev. Codes Ann. § 95-2206.9(6) (Supp.1977); Neb.Rev.Stat. § 29-2523(2)(e) (1975); Nev.Rev.Stat. § 200.035(4) (1977); N.C.Gen.Stat. § 15A-2000(f)(4) (Supp.1977), added by 1977 N.C.Sess. Laws, ch. 406; S.C. Code § 16-3-20(C)(b)(4) (Supp.1978); Tenn. Code Ann. § 39-2404(j)(5) (Supp.1977); Utah Code Ann. § 76-3-207(1)(f) (Supp.1977); Wash.Rev. Code § 9A.32.045(2)(d) (Supp.1977); Wyo.Stat. §§ 6-54.2(c), (d), and (j)(iv) (Supp.1977), added by 1977 Wyo.Sess. Laws, ch. 122.
The nine state statutes allowing consideration of any mitigating circumstance are Del. Code Ann., Tit. 11, § 4209(c) (Supp.1977); Ga. Code § 27-2534.1(b) (1975); Idaho Code § 19-2515(c) (Supp.1977); Ill.Rev.Stat., ch. 38, § 9-1(c) (Supp.1978); Miss. Code Ann. § 97-3-21 (Supp.1977), see *Jackson v. State*, 337 So.2d 1242, 1254 (Miss.1976); N.H.Rev.Stat.Ann. § 630:5(II) (Supp.1977); 21 Okl.Stat., Tit. 21, § 701.10 (Supp.1977); Tex.Code Crim.Proc. Ann., Art. 37.071(b)(2) (Vernon Supp.1978), see *Jurek v. Texas*, 428 U.S. 262, 272-273, 96 S.Ct. 2950, 2956-2957, 49 L.Ed.2d 929 (1976); Va. Code § 19.2-264.4(B) (Supp.1977).

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# EXHIBIT 45

120 Nev. 1030
Supreme Court of Nevada.

The STATE of Nevada, Appellant,
v.
Cameron Scott CATANIO, Respondent.

No. 42628. | Dec. 29, 2004.

**Synopsis**
**Background:** After defendant was charged with three counts of lewdness with a minor, defendant filed a motion to dismiss the charges. The District Court, Second Judicial District, Washoe County, Steven R. Kosach, J., dismissed the charges against defendant. The State appealed.

**[Holding:]** The Supreme Court held that evidence was sufficient to establish probable cause to believe that defendant committed lewdness with a minor, despite lack of physical contact between defendant and victims.

Reversed.

West Headnotes (8)

[1] **Infants**
Enticement, luring, and inducement in general

Evidence was sufficient to establish probable cause to believe that defendant committed lewdness with a minor, even though defendant did not have physical contact with the victims; defendant offered the victims money to masturbate in his presence. West's NRSA 201.230.

1 Cases that cite this headnote

[2] **Criminal Law**
Review De Novo

Statutory interpretation is a question of law subject to de novo review.

11 Cases that cite this headnote

[3] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

For the purpose of statutory interpretation, the Supreme Court must attribute the plain meaning to a statute that is not ambiguous.

15 Cases that cite this headnote

[4] **Statutes**
What constitutes ambiguity; how determined

For the purpose of statutory interpretation, an ambiguity arises where the statutory language lends itself to two or more reasonable interpretations.

13 Cases that cite this headnote

[5] **Statutes**
Intent

Legislative intent is the controlling factor in statutory construction.

3 Cases that cite this headnote

[6] **Statutes**
Purpose and intent; determination thereof
**Statutes**
Policy considerations; public policy

For the purpose of statutory interpretation, the Supreme Court looks to reason and public policy to discern legislative intent.

4 Cases that cite this headnote

[7] **Criminal Law**
Liberal or strict construction; rule of lenity

When ambiguous, criminal statutes must be strictly construed and resolved in favor of the defendant.

1 Cases that cite this headnote

Next:

[8] **Infants**

Indecency and indecent liberties in general

Statute prohibiting lewdness with a minor, which addresses acts "upon or with the body ... of a child," does not require any physical contact between the perpetrator and the minor; language providing that an act may be committed "with" the minor's body indicates that the minor's body is the object of attention, and a perpetrator who threatens, coerces, or otherwise instigates a lewd act but has no physical contact with the victim may thus satisfy the elements of the statute. West's NRSA 201.230, subd. 1.

1 Cases that cite this headnote

**Attorneys and Law Firms**

**589 Brian Sandoval, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Gary H. Hatlestad, Deputy District Attorney, Washoe County, for Appellant.

Law Offices of John E. Oakes and John E. Oakes and Justin E. Oakes, Reno, for Respondent.

Before BECKER, AGOSTI and GIBBONS, JJ.

**Opinion**

*1031 *OPINION*

PER CURIAM.

*FACTS*

This is the State's appeal from a district court order granting respondent Cameron Catanio's motion to dismiss three counts of lewdness with a minor based on a determination that the State failed to present sufficient evidence for the required finding of probable cause at the grand jury proceedings. [1] The district court concluded that Catanio's conduct did not satisfy all of the essential elements of lewdness with a minor. We disagree and therefore reverse.

Catanio worked as a teacher's aide for special education students and as a volunteer assistant track coach at a middle school in Reno, *1032 Nevada. During the fall of 2002, Catanio befriended three 13–year–old boys at the school and began giving the boys candy on a daily basis. Over time, Catanio's gifts became more elaborate, personal and inappropriate. His gifts included a video game system and games, air pistols, ammunition, protective gear, pornographic materials, handcuffs and condoms.

In December 2002, after a snowball fight with the three boys, Catanio offered the boys cash, which he never paid, if the boys would **590 masturbate behind some bushes. Two of the boys went behind some bushes and did so while Catanio watched their backs from his parked car. A few days later, Catanio bought a cellular phone for one of the boys; they used the phone for late night conversations in which they discussed sex and masturbation. In two different instances, two of the boys separately snuck out of their houses and met Catanio. On each occasion, Catanio took the minor to his apartment and gave him alcohol, played pornographic videos for him, gave him a condom and invited him to masturbate.

During an interview with the Washoe County School District police, Catanio admitted that he had an erection when he watched the boys masturbate behind the bushes. He also admitted becoming sexually aroused on the two occasions when each boy masturbated in his apartment and that he masturbated himself each time after taking each boy home. At no time did Catanio have any physical contact with any of the boys.

In dismissing the lewdness counts against Catanio, the district court determined that, after accepting the facts established before the grand jury as true, Catanio did not commit a criminal act or acts. The district court concluded that NRS 201.230, which criminalizes lewdness with a child under 14 years, requires proof of physical contact between the accused and the victim.

The State now appeals from the order dismissing the lewdness charges. The question we are asked to resolve is whether the lewdness statute requires the State to prove that physical contact occurred between Catanio and the victims named in the complaint. We conclude that the statute does not require physical contact, and therefore, we reverse the district court's order and remand for further proceedings.

*DISCUSSION*

[1] The State argues that a physical touching is not an essential element of lewdness with a minor under NRS 201.230. The State points out that the California lewdness statute, which closely resembles Nevada's statute,[2] has been interpreted to require only that *1033 the accused act to instigate or encourage a touching. The necessary touching may be by the child upon himself or herself at the perpetrator's urging.

[2] [3] [4] [5] [6] [7] Statutory interpretation is a question of law subject to de novo review.[3] We must attribute the plain meaning to a statute that is not ambiguous.[4] An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations.[5] Legislative intent is the controlling factor in statutory construction.[6] We look to reason and public policy to discern legislative intent.[7] Finally, when ambiguous, "[c]riminal statutes must be 'strictly construed and resolved in favor of the defendant.' "[8]

[8] To determine whether a statute's language is ambiguous, we must examine it. NRS 201.230(1) defines lewdness with a child under 14 years:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of **591 that child, is guilty of lewdness with a child.

We conclude that the language describing a lewd act committed "upon or with the body" of a child under 14 is unambiguous. Because "upon" means "on," that language requires that the lewd action be done on the body of the minor, that is, some kind of touching or physical contact is required. However, the statute states "upon or with." By using the disjunctive "or," the statute clearly indicates that "upon" and "with" have different meanings. An act committed "with" the minor's body indicates that the minor's *1034 body is the object of attention, and that language does not require a physical touching by the accused. Rather, the perpetrator need only cause the child to perform a lewd act upon him or herself to satisfy the elements set forth in the statute. Common sense also dictates this conclusion. When a person invites another person to do an act by saying, "come to the movies *with* me" or "come outside to play *with* me" or "watch T.V. *with* me" or "I'd like to play ball *with* you," no physical contact is necessarily intimated or required.

Considering our published opinions involving a charge of lewdness with a minor, we acknowledge that all but one involve a physical touching.[9] In two cases, the touchings were as minimal as *1035 pulling the victims' clothing aside to photograph them.[10] In one case, after pulling the victim's clothing aside and photographing her, the defendant masturbated in front of the victim.[11] In *Houtz v. State*, however, the perpetrator did not touch the victim.[12] Rather, he provided alcohol and pornographic materials to the victim and ordered the victim to masturbate, and if the **592 victim refused, threatened to tear his penis off. The perpetrator also masturbated. The defendant entered a plea of nolo contendere to one count of lewdness with a minor and was adjudged guilty based upon his plea. The issue in his appeal was not whether a touching had occurred but whether the statute of limitations had expired.[13] That the element of a lewd act "upon or with" the body of the victim was satisfied was not challenged. Nevertheless, *Houtz* demonstrates that the district court had determined that coercing a child to masturbate under threat of pain and masturbating in the child's presence were sufficient to satisfy the elements of lewdness with a minor.

In *Summers v. Sheriff*, the appellant contended that insufficient evidence was shown to bind him over for trial on a charge of lewdness with a minor.[14] The preliminary hearing evidence showed that the appellant had lowered the victim's bathing suit to her knees and photographed her, then masturbated in front of her. The appellant argued that the lack of physical contact between himself and the victim precluded the charge.[15] We held that physical contact occurred when the appellant touched the victim by lowering her bathing suit.[16] Because it was unnecessary to do so in order to decide that case, we declined to reach the issue of whether actual physical contact was a required element of the crime of lewdness with a minor.[17]

Our decision in *Summers* is similar to the California case that set the precedent there that the accused merely needs to instigate the touching. In *People v. Austin*, the defendant,

threatening the victim with a knife, pushed and guided the victim to an orchard and then told her that, if she pulled down her pants, he would give her some ***1036** money.[18] The child complied, and the perpetrator gave her a dollar. The California Fifth District Court of Appeal held that the defendant's conduct satisfied the essential elements of lewdness with a minor both when he pushed the child toward the orchard and when, at his instigation, the child removed her pants, as she necessarily had to touch herself to do so.[19]

Similarly, in *People v. Meacham*, the California Second District Court of Appeal held that instructing children to touch themselves satisfied the elements of lewdness with a minor so long as the perpetrator had the requisite specific intent.[20] The court noted that the evidence showing that the appellant's instructions to the victims to position their hands upon their own genitalia was "imputable to appellant as if the touching had been actually done by his own hands."[21]

We agree with the California courts' interpretation of what must be proven to establish the elements of the crime of lewdness. We further conclude that the Nevada statutory language providing that a lewd act be done "upon or with" a child's body clearly requires specific intent by the perpetrator to encourage or compel a lewd act in order to gratify the accused's sexual desires, but does not require physical contact between the perpetrator and the victim. Thus, a perpetrator who threatens, coerces or otherwise instigates a lewd act but has no physical contact with the victim may nevertheless satisfy the elements of NRS 201.230.

In this case, Catanio had no physical contact with the boys. Catanio offered the boys money to masturbate in his presence and brought two of the boys separately to his apartment where he gave them alcohol, played pornographic videos and invited the boys to masturbate. Therefore, accepting as true the evidence offered to the grand jury, ****593** we conclude that the State presented sufficient evidence to establish probable cause to believe that Catanio committed lewdness with a minor.

Accordingly, we conclude that the district court erred by dismissing the charges of lewdness with a minor because Catanio never touched any of the boys. Therefore, we reverse the district court's order and remand for further proceedings.

**Parallel Citations**

102 P.3d 588

Footnotes

1 The other counts are not at issue.

2 *See* Cal.Penal Code § 288(a) (West 1999) (stating that "[a]ny person who willfully and lewdly commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony").

3 *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004).

4 *Id.*

5 *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983).

6 *Id.*

7 *Id.*

8 *Firestone*, 120 Nev. at 16, 83 P.3d at 281 (quoting *Anderson v. State*, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979)); *see also Villanueva v. State*, 117 Nev. 664, 670 n. 13, 27 P.3d 443, 447 n. 13 (2001) (noting that "the rule of lenity does not apply where statutory language is unequivocal and there is no ambiguity to resolve").

9 *See, e.g., Crowley v. State*, 120 Nev. 30, 31–32, 83 P.3d 282, 284 (2004) (defendant rubbed male victim's penis outside of clothing and performed fellatio on victim, and fondled female victim's breasts and vagina); *Ramirez v. State*, 114 Nev. 550, 553, 958 P.2d 724, 726 (1998) (defendant touched victim on her genitals); *Scott E., a Minor v. State*, 113 Nev. 234, 236, 931 P.2d 1370, 1371 (1997) (defendant allegedly touched victim's vaginal area and had victim touch his exposed penis); *Griego v. State*, 111 Nev. 444, 448, 893 P.2d 995, 998 (1995) (defendant fondled child victim), *abrogated on other grounds by Koerschner v. State*, 116 Nev. 1111, 1116, 13 P.3d 451, 455 (2000); *Carroll v. State*, 111 Nev. 371, 372, 892 P.2d 586, 587 (1995) (defendant fondled victim's legs, thighs and vaginal area); *State v. Purcell*, 110 Nev. 1389, 1391, 887 P.2d 276, 277 (1994) (defendant allegedly fondled victim's breasts and buttocks); *Taylor v. State*, 109 Nev. 849, 850, 858 P.2d 843, 844 (1993) (defendant touched victim between her legs as she sat on his lap); *Keeney v. State*, 109 Nev. 220, 223, 850 P.2d 311, 313 (1993) (defendant touched victim's " 'private spot' " with his tongue), *overruled on other grounds by Koerschner*, 116 Nev. at 1116, 13 P.3d at 455; *Sterling v. State*, 108 Nev. 391, 393, 834 P.2d 400, 401

(1992) (defendant engaged in sexual acts with victim); *Walstrom v. State*, 104 Nev. 51, 52, 752 P.2d 225, 226 (1988) (slides revealed defendant engaged in lewd acts with child), *overruled in part on other grounds by Hubbard v. State*, 112 Nev. 946, 948, 920 P.2d 991, 993 (1996); *Passama v. State*, 103 Nev. 212, 216, 735 P.2d 321, 324 (1987) (defendant confessed through coercion to touching victims' vaginas); *Sheriff v. Frank*, 103 Nev. 160, 162, 734 P.2d 1241, 1242 (1987) (defendant allegedly touched victim's chest and genitals); *Meador v. State*, 101 Nev. 765, 767, 711 P.2d 852, 853–54 (1985) (defendant pulled girls' nightshirts up to photograph them); *Sheriff v. Miley*, 99 Nev. 377, 379–80, 663 P.2d 343, 344 (1983) (defendant attacked and possibly sexually penetrated victim); *Meyer v. State*, 95 Nev. 885, 886, 603 P.2d 1066, 1066 (1979) (defendant allegedly forced child to perform fellatio), *overruled by Little v. Warden*, 117 Nev. 845, 851, 34 P.3d 540, 544 (2001); *Maes v. Sheriff*, 94 Nev. 715, 716, 582 P.2d 793, 794 (1978) (defendant forced victim to fondle defendant's genitals and licked victim's penis and groin); *Findley v. State*, 94 Nev. 212, 214, 577 P.2d 867, 867 (1978) (defendant placed hand on victim's genitals), *overruled by Braunstein v. State*, 118 Nev. 68, 75, 40 P.3d 413, 418 (2002); *Green v. State*, 94 Nev. 176, 177–78, 576 P.2d 1123, 1124 (1978) (defendant rolled victim's shirt up); *Summers v. Sheriff*, 90 Nev. 180, 181, 521 P.2d 1228, 1228 (1974) (defendant allegedly pulled victim's bottoms down, photographed her and masturbated in front of her); *Sheriff v. Dearing*, 89 Nev. 255, 255, 510 P.2d 874, 874 (1973) (defendant allegedly performed cunnilingus on victim); *Martin v. Sheriff*, 88 Nev. 303, 305, 496 P.2d 754, 755 (1972) (defendant allegedly inserted penis into victim); *Farrell v. State*, 83 Nev. 1, 2, 421 P.2d 948, 948 (1967) (defendant allegedly touched victim inside her panties).

10 *Meador*, 101 Nev. at 767, 711 P.2d at 853–54; *Summers*, 90 Nev. at 181, 521 P.2d at 1228.

11 *Summers*, 90 Nev. at 181, 521 P.2d at 1228.

12 111 Nev. 457, 893 P.2d 355 (1995); *see also Townsend v. State*, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987) (one count of lewdness with a minor was based on defendant masturbating in front of victim and second count was based on defendant fondling victim).

13 *Houtz*, 111 Nev. at 461, 893 P.2d at 357.

14 90 Nev. at 182, 521 P.2d at 1229.

15 *Id.*

16 *Id.*

17 *Id.*

18 111 Cal.App.3d 110, 168 Cal.Rptr. 401, 402 (1980).

19 *Id.* at 403.

20 152 Cal.App.3d 142, 199 Cal.Rptr. 586, 593 (1984), *abrogated on other grounds by People v. Brown*, 8 Cal.4th 746, 35 Cal.Rptr.2d 407, 883 P.2d 949, 959 (1994).

21 *Id.* at 594.

# EXHIBIT 46

July 1, 2011

# Danish Company Blocks Sale of Drug for U.S. Executions

By DAVID JOLLY

PARIS — A Danish pharmaceutical company said Friday that it would stop shipping a powerful drug to American prisons that carry out the death penalty by lethal injection because some states began using it as a substitute for another compound that was taken off the market.

The company, Lundbeck, said in a statement that it "adamantly opposes the distressing misuse of our product in capital punishment." Lundbeck informed its distributors that from now on its sodium pentobarbital injection, a barbiturate sold under the brand name Nembutal, would be available in states that conduct lethal-injection executions on only a restricted basis.

"After much consideration, we have determined that a restricted distribution system is the most meaningful means through which we can restrict the misuse of Nembutal," Ulf Wiinberg, Lundbeck's chief executive, said in the statement. "While the company has never sold the product directly to prisons and therefore can't make guarantees, we are confident that our new distribution program will play a substantial role in restricting prisons' access to Nembutal for misuse as part of lethal injection."

The death penalty is prohibited throughout the 27-member European Union, and human rights groups have brought pressure on drugmakers not to supply lethal drugs for American executions.

In execution by lethal drugs, a prisoner is injected with one or more drugs, which can include anesthetics, barbiturates and muscle relaxants.

Lundbeck's decision applies to prisons in 14 states, said Mads Kronborg, a company spokesman. It follows moves by states including Mississippi, Ohio, Oklahoma and Texas, to use the drug for executions. States began using pentobarbital as a substitute for the

anesthetic sodium thiopental when that drug's only American producer, Hospira Inc. of Lake Forest, Ill., announced in January that it would stop selling the drug.

Reprieve, a human rights group in London that has led in the movement to stop European companies from selling lethal injection drugs to the United States, said pentobarbital had been used to execute 18 prisoners.

"We also need to see action from the European Commission to block the export of execution drugs from the E.U. to the U.S.," a Reprieve spokeswoman, Maya Foa, said in a statement. "Several European firms have already become involved in this grim business on their watch — this must not be allowed to happen again."

While pentobarbital is an old drug, vulnerable to competition from generics, Nembutal is currently the only version available in the United States that can be injected, Mr. Kronborg said.

"We would have withdrawn it from the market," he said. "Strategically, financially it's completely insignificant to us.

"But experts said it was important to have it available for therapeutic use," including as an emergency treatment of severe epilepsy and as a strong sedative, he added.

Lundbeck said it would review orders before providing clearance for shipping the drug and deny orders from prisons located in states currently carrying out executions. Purchasers must give written agreement that they will not redistribute the drug. Previously, distributors were required only to ensure that a buyer had the necessary licenses for ordering controlled substances.

"We were completely shocked and outraged" to learn that the drug was being used for executions, Mr. Kronborg said. "States and prisons never asked. We only found about it from the media. If they had asked, we would have said no."

# EXHIBIT 47

The New York Times

August 18, 2013

# Death Row Improvises, Lacking Lethal Mix

By RICK LYMAN

The decision by the Missouri Supreme Court to allow propofol, the same powerful anesthetic that caused the death of Michael Jackson, to be used in executions — coming at a time when Texas, Ohio, Arkansas and other states are scrambling to come up with a new drug for their own lethal injections — is raising new questions about how the death penalty will be carried out.

"The bottom line is no matter what drugs they come up with, despite every avenue these states have pursued, every drug they have investigated has met a dead end," said Deborah Denno, a professor at Fordham Law School who studies execution methods and the death penalty. "This affects every single execution in the country. It just stalls everything, stalls the process."

With manufacturers now refusing to supply corrections departments with the drugs they had been using for executions, some states, like Georgia, have been resorting to obtaining drugs from compounding pharmacies — specialty drugmakers — which death penalty opponents say lack the proper quality control. Other states, as they run low on their old stock of drugs and are unable to replace them, are turning to new, untried methods like propofol or simply announcing that they are searching for a solution.

In the beginning, it was relatively simple and uniform. Several dozen states adopted the three-drug cocktail for executions first used by Texas three decades ago — a sedative (usually sodium thiopental) was mixed with a paralytic agent (pancuronium bromide) followed by a drug inducing cardiac arrest (potassium chloride). The idea was to provide a quick, painless method to replace the electric chair, gas chamber and firing squad.

But a shortage of pancuronium bromide a few years ago led some states to switch to a single-drug method, often simply administering enough sodium thiopental to cause death. The manufacturer of that drug, however, the Illinois-based Hospira, stopped providing it to corrections departments after workers at its Italian plant, and European officials, objected to the use of the drug for executions.

Many state corrections departments switched to pentobarbital, another powerful sedative, in their three-drug cocktail. But when its manufacturer, the Danish-based Lundbeck, learned that its product was being used in death penalty cases, it refused to sell any more to corrections departments and insisted that its American distributors also refuse to supply the drug.

Then, just last month, a federal judge in Washington ruled that sodium thiopental could not be imported into the country at all, because it had never been approved by the federal Food and Drug Administration. (It had been introduced before such F.D.A. approvals began.)

This has left states unsure of what to do when their stockpiles run out — use some other drug like propofol, buy versions of sodium thiopental or pentobarbital from a compounding pharmacy, or abandon lethal injections altogether and return to some other form of capital punishment.

"It's an artificially created problem," said Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, which supports the death penalty. "There is no difficulty in using a sedative such as pentobarbital. It's done every day in animal shelters throughout the country. But what we have is a conspiracy to choke off capital punishment by limiting the availability of drugs."

The issue is expected to come to a head soon. Both Texas, the state with the busiest death house, and Ohio have said they would introduce a new lethal injection protocol in the next couple of months. Officials in both of those states have said in court filings that they would run out of their stockpiles in September.

"Corrections departments often buy a year's supply of the drugs they use, but it has a shelf life and it's expiring," said Richard C. Dieter, the executive director of the Death Penalty Information Center. "I think we are about to have some new breakthroughs on what the states are using. A lot of them will probably follow whatever Texas decides to do."

On Wednesday, the Missouri Supreme Court decided to allow executions using propofol to move ahead in October and November. There is no question that it would kill, but since it has never been used in an execution, death penalty opponents say, there is no way to say how much pain might be involved or what dose should be administered.

Arkansas had announced that it would use pentobarbital in its executions, but when that drug became unavailable, the governor refused to schedule any more executions until the state came up with a substitute — which has not happened.

California also announced, in June, that it would abandon the use of a three-drug cocktail and is studying what to replace it with.

"This drug issue is a temporary problem that is entirely fixable," Mr. Scheidegger said. "It is not a long-term impediment to the resumption of capital punishment."

Death penalty opponents, however, feel that the rejection of one drug after another will inevitably limit capital punishment.

Executions in the United States reached their height in 1999, when 98 people were put to death.

Since then, there has been a slow, steady drop in both the number of executions and the number of people being given the death penalty — in part because the rapid growth of life-without-parole sentences has given prosecutors a powerful plea-bargaining tool.

There were 43 executions in the United States in 2012, Mr. Dieter said, and a slightly lower number — 30 to 40 — is expected this year.

At the same time, six states — Connecticut, Illinois, Maryland, New Jersey, New Mexico and New York — have abandoned the death penalty in recent years.

Still, some 3,125 inmates were on death row in the United States as of January, including a handful in those states that have recently abandoned the death penalty. And advocates on both sides of the question say that public opinion polls continue to show strong public support for capital punishment.

"This issue of the drugs is just a way to stop things or slow them down," said Robert Blecker, a professor of criminal law at New York Law School and a death penalty supporter. "It's an abolitionist tactic to gum up the works. I know why they're doing it. From their perspective, every death delayed is a day in favor of abolition. It's just another tactic."

*This article has been revised to reflect the following correction:*

***Correction: August 23, 2013***

*An article on Monday about drugs used for executions described incorrectly regulations on pharmacies that are specialty drugmakers. While these so-called compounding pharmacies are not covered by federal drug regulations, as are major drug manufacturers, they must still abide by state regulations governing all pharmacies; they are not "unregulated." The article also erroneously included one state among those that have voted in the past six years to abandon the*

*death penalty. New York is not one that has done so. (New York's statute was ruled unconstitutional in 2004, and lawmakers have not offered a new law.)*

# EXHIBIT 48

LAS VEGAS SUN

# Door to clang shut on ancient state prison

**By Cy Ryan (contact)**

Saturday, May 14, 2011 | 2:17 p.m.

CARSON CITY – The ancient Nevada State Prison, initially opened when Abraham Lincoln was president, is finally going to close.


The Senate Finance Committee and the Assembly Ways and Means Committee voted Saturday to phase out the Carson City facility by April 2012 at a savings of more than $17 million.

Most of the 682 inmates will be transferred to the High Desert State Prison in Clark County, along with 59 staff.

Gov Brian Sandoval proposed in his budget the closure by Oct. 31 this year, but the budget committees, on the recommendation of Senate Majority Leader Steven Horsford, D-Las Vegas, delayed the phase out.

Horsford said more time was needed to plan the transfer and this would give the officers who are losing their jobs more time to find other employment. And those who are being transferred to High Desert will have more time to re-locate.

The prison, one of the oldest in the United States, was a hotel when purchased by the state in 1862. It burned in 1867 and was rebuilt.

There will be 105 positions eliminated by the closure. But Greg Cox, acting director of the state Department of Corrections, said some of those jobs have been kept vacant.

He said only about 30 officers would lose their jobs. Almost all the officers will retain their employment if they want to move to Las Vegas or other prisons.

Horsford, chairman of the Senate Finance, got assurance from Cox that there were no plans for building a new prison or for expanded facilities.

Assemblyman Tom Grady, R-Yerington, complained the former corrections director didn't do any maintenance on the state prison. He said he would not support closure because so many people are affected.

The joint committees voted down the recommendation of Gov. Sandoval. And there was applause from prison employees in the audience.

But then Sandoval offered the plan to keep it open six months longer than the recommendation and that passed.

While the prison will be closed, the inmate license plate factory and the print shop/book bindery operation will be kept open with inmates housed at the nearby Stewart facility.

The state's only execution chamber is located at the prison. The correctional department said it would open the chamber if an execution was necessary. The last execution was in April 2006.

Cox told the joint committees that the 712-bed state prison in Jean in Clark County, shut down some three years ago, remains closed. He said some other states and prison industry have looked at taking it over but they wanted a facility with 1,200 to 1,500 beds.

The committees also voted to shut down the 150-bed honor camp at Wells. Sandoval initially recommended its closure but then pumped more than $2 million to keep it open.

Inmates in the camp are used to battle range fires in northeast Nevada and they chop wood and clean snow on the sidewalks of senior citizens during the winter months.

The Wells camp will also be phased out, closing in June 2012.

The committees followed the recommendation of the governor to eliminate swing-shift differential pay for prison officers. These employees receive 5 percent extra if they work four hours between 6 p.m. and 7 a.m.

The committees, however, rejected the recommendations of the governor to eliminate extra pay for working in rural prisons in Lovelock and Ely and a mileage differential for working at Indian Springs which is 25 miles outside metropolitan Las Vegas.



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# EXHIBIT 49

Assemblyman Aizley asked whether all maintenance requests had been included in the 2013-2015 CIP. Mr. Leiser replied that there were a number of maintenance and deferred maintenance decision units recommended throughout agency operating budgets. The Buildings and Grounds Section had funding in its operating account to address various deferred maintenance needs in state-owned buildings throughout the state during the 2013-2015 biennium.

In addition, Mr. Leiser explained, the State Public Works Division maintained an inventory of known deferred maintenance projects that would be needed over the next ten-year period. He said projects had been identified for funding in upcoming biennia.

Assemblyman Eisen asked for further consideration of Project 13-C07.

SENATOR SMITH MOVED TO APPROVE THE PROJECTS IN THE 2013-2015 CAPITAL IMPROVEMENT PROGRAM AS REVISED, WITH THE EXCEPTION OF PROJECTS 13-C02, 13-C03, 13-C07, 13-C08, 13-P01, AND 13-S08.

ASSEMBLYWOMAN CARLTON SECONDED THE MOTION.

THE MOTION CARRIED. (Senator Roberson and Assemblyman Horne were not present for the vote.)

Senator Denis asked members if they had questions or concerns regarding any of the six projects that required separate action by the Subcommittees. Hearing none, he called for a vote on the first item, Project 13-C02.

- Project 13-C02: Remodel Administration Building to Accommodate Execution Chamber—Ely State Prison. Assembly Bill 444 required that a legislative audit be conducted on the death penalty in the state, which would include a review of facilities to carry out a death sentence.

  SENATOR SMITH MOVED TO NOT APPROVE CAPITAL IMPROVEMENT PROJECT 13-C02.

  ASSEMBLYWOMAN CARLTON SECONDED THE MOTION.

  THE MOTION CARRIED. (Senator Roberson was not present for the vote.)

Mr. Cox agreed, but added that there was potential for an inmate to waive his appeal rights and volunteer to be executed. He said a 30-day time frame was the standard for moving forward with the process, and the Attorney General agreed. Mr. Cox said the Department was obligated to perform the executions under state law, and he, as the Director, had to move forward with the process.

Assemblyman Hickey noted that 12 executions had taken place in the last 37 years, 11 of which were voluntary, and it had been 7 years since the last execution. He asked how many inmates were currently on death row.

DARYL MACK 4/20/2006

Mr. Cox replied there were 83 inmates currently on death row. A number of them were involved in litigation, and the Department had been advised that the possibility of an execution taking place was from 30 days to 18 months. He said there would be litigation regardless of where the chamber was located. It was his professional opinion that the execution chamber at the Nevada State Prison would involve a tremendous amount of litigation because of the physical plant, its current location, and the Department's inability to comply with other regulations, including the Americans with Disabilities Act.

Chair Horne asked whether, if the 30-day window were to occur 30 days from this date, the Department would be able to carry out an execution at the Nevada State Prison, and whether Mr. Cox was concerned that a lawsuit may occur because of the facility.

Mr. Cox replied it would be possible for an execution to take place at NSP. He believed that litigation would occur because of the physical plant at the facility. The mobility and other circumstances associated with the inmate could also lead to lengthy litigation, but he reiterated, it would be possible to carry out an execution at NSP.

Chair Horne asked whether there would be legal ramifications if the Department did not carry out an execution warrant in that window of time because a facility was not available.

Mr. Cox said the Director was obligated to follow the law, and he would have to research litigation associated with the Department's inability to move forward. He believed the inability to carry out an execution would be a problem for him as the Director.

# AB444

**Introduced in the Assembly on** Mar 25, 2013.

**By: Legislative Operations and Elections**

*Provides for an audit of the fiscal costs of the death penalty. (BDR S-817)*

**DECLARED EXEMPT**

**Fiscal Notes View Fiscal Notes**

Effect on Local Government: No.
Effect on State: Yes.

**Most Recent History Action:** Approved by the Governor. Chapter 469.
**(See full list below)**

**Upcoming Hearings**

**Past Hearings**

| | | | | |
|---|---|---|---|---|
| Assembly Legislative Operations and Elections | Mar 25, 2013 See Agenda | **Agenda** | **Minutes** | Discussed as BDR |
| Assembly Legislative Operations and Elections | May 02, 2013 04:00 PM | **Agenda** | **Minutes** | No action |
| Assembly Legislative Operations and Elections | May 09, 2013 04:00 PM | **Agenda** | **Minutes** | Amend, and do pass as amended |
| Assembly Ways and Means | May 22, 2013 08:00 AM | **Agenda** | **Minutes** | Mentioned no jurisdiction |
| Senate Legislative Operations and Elections | May 23, 2013 09:00 AM | **Agenda** | **Minutes** | No Action |
| Senate Legislative Operations and Elections | May 28, 2013 09:00 AM | **Agenda** | **Minutes** | Do pass |

**Final Passage Votes**

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Assembly Final Passage** | **(1st Reprint)** | May 17, 2013 | Yea 38, | Nay 1, | Excused 3, | Not Voting 0, | Absent 0 |
| **Senate Final Passage** | **(2nd Reprint)** | May 30, 2013 | Yea 11, | Nay 10, | Excused 0, | Not Voting 0, | Absent 0 |

**Bill Text** **As Introduced** **1st Reprint** **2nd Reprint** **As Enrolled**

**Adopted Amendments** **Amend. No. 604** **Amend. No. 907**

**Bill History**

**Mar 25, 2013**

- Read first time. Referred to Committee on Legislative Operations and Elections. To printer.

**Mar 26, 2013**

- From printer. To committee.

**Apr 09, 2013**

- Exempt pursuant to subsection 4 of Joint Standing Rule 14.6.

**May 16, 2013**

- From committee: Amend, and do pass as amended.
- Placed on Second Reading File.
- Read second time. Amended. (Amend. No. **604**.) To printer.

**May 17, 2013**

- From printer. To engrossment. Engrossed. **First reprint** .
- Read third time. Passed, as amended. Title approved. **(Yeas: 38, Nays: 1, Excused: 3.)** To Senate.

**May 18, 2013**

- In Senate.
- Read first time. Referred to Committee on Legislative Operations and Elections. To committee.

**May 28, 2013**

- From committee: Do pass.
- Placed on Second Reading File.
- Read second time.

**May 29, 2013**

- Read third time. Amended. (Amend. No. **907**.) To printer.

**May 30, 2013**

- From printer. To re-engrossment. Re-engrossed. **Second reprint** .
- Read third time. Passed, as amended. Title approved. **(Yeas: 11, Nays: 10.)** To Assembly.

**May 31, 2013**

- In Assembly.

**Jun 01, 2013**

- Senate Amendment No. **907** concurred in.

**Jun 02, 2013**

- To enrollment.

**Jun 05, 2013**

- Enrolled and delivered to Governor.

**Jun 10, 2013**

- Approved by the Governor. Chapter 469.
- **Effective June 10, 2013.**

# EXHIBIT 50

ABOLITION DAY
CAMPAIGN TO END THE DEATH PENALTY
CONNECTICUT

# SIGN-ON LETTER

*for Victims' Families*

We are individuals and families who have lost loved ones to murder. At a moment none of us could have predicted or prepared for, tragedy robbed from us children, parents, spouses, brothers and sisters, and other family members. Our direct experiences with the criminal justice system and struggling with grief have led us all to the same conclusion: Connecticut's death penalty fails victims' families.

Our view on the death penalty may come as a surprise. Supporters of ending the death penalty often face the question: "What if it were your loved one who was murdered?" For each one of us, that question has ceased to be hypothetical and become a reality.

We never asked to be in this position, and would do anything to change it. We realize, however, that nothing can erase the loss that a senseless act of violence brought into our lives. But we can honor the memory of our loved ones and other families who may face tragedy by working for effective responses to violence. The death penalty, rather than preventing violence, only perpetuates it and inflicts further pain on survivors.

The reality of the death penalty is that it drags out the legal process for decades. In Connecticut, the death penalty is a false promise that goes unfulfilled, leaving victims' families frustrated and angry after years of fighting the legal system. And as the state hangs onto this broken system, it wastes millions of dollars that could go toward much needed victims' services.

Some believe that they stand with victims' families by supporting the death penalty for "particularly heinous murders." We have difficulty understanding this position. The implication is that other murders are ordinary and do not merit the death penalty. From experience, we can tell you that every murder is heinous, a tragedy for the lost one's family. The death penalty has the effect of elevating certain victims' families above others. Connecticut should be better than that.

As lawmakers consider whether to keep or end Connecticut's death penalty, they truly face a life or death decision. It deserves careful consideration and consultation from the primary stakeholders in the state's system of capital punishment. We urge our lawmakers to make the choice that best serves the interests of victims' families. We urge them to abolish Connecticut's death penalty.

Denise Afield of Avon
*Cousin of Nancy Bishop Langert, Richard Langert, and their unborn child*

Henrietta Beckman of Hartford
*Son Randy Beckman was murdered*

Roger Beckman of Hartford
*Brother Randy Beckman was murdered*

Deborah Begin of Terryville
*Aunt Roberta and Uncle Ronald Ahrlich were murdered*

Sara Begin of Terryville
*Great Aunt Roberta and Uncle Ronald Ahrlich were murdered*

Antoinette Bosco of Brookfield
*Son John and daughter-in-law Nancy Bosco were murdered*

Elizabeth Brancato of Torrington
*Mother Barbara McKitis was murdered*

Kathryn P. Bushnell of Enfield
*Cousin Martin Potter was murdered*

Juan Candelaria of New Haven
*Grandmother Carmen L. Colon was murdered*

Gail Canzano
*Brother-in-law Thomas E. Otte was murdered in Hartford*

Jane Caron of Thomaston
*Aunt Dorothy McIntyre was murdered*

Wendy Lou Cates of Willimantic
*Niece Kim Rivera as murdered*

Delois Charles of Derby
*Sons Terrence S. Ham and Howard Charles Jr. were murdered*

Sarah P. Cheney
*Father Thomas E. Otte was murdered in Hartford*

Tim Coffee of Stamford
*Aunt Cornelia Crilley was murdered*

Colleen Coleman
*Brother-in-law Thomas E. Otte was murdered in Hartford*

Shereese Cook of Hartford
*Cousins Sammuel Drummer, Anthony Alexdria, Kenneth Waden, and Tristan Cook were murdered*

Victoria Coward of New Haven
*Son Tyler Coward was murdered*

Dwight Davis of Norwalk
*Cousin Horace Williams was murdered*

Catherine Ednie
*Brother David Joseph Froehlich was murdered in Georgetown*

Walter H. Everett
*Son Scott Everett was murdered in Bridgeport*

Wayne Everett
*Brother Scott Everett was murdered in Bridgeport*

Samantha Fasanello of Fairfield
*Mother Valerie Fasanello was murdered*

Frank Fazio of Stamford
*Uncle Phillip Fazio was murdered*

Jocelyne S. Ferrer of Plainville
*Son Henri-Robert Ferrer was murdered*

Nancy Filiault
*Sister Katherine Kleinkauf, niece Rachel Kleinkauf, and nephew Kyle Kleinkauf were murdered in Guilford*

Gina Flagg of Hartford
*Cousin Randy Beckman was murdered*

Kristin Froehlich
*Brother David Joseph Froehlich was murdered in Georgetown*

Susanne Fusso of Middletown
*Mother was murdered*

Sunny Khadjavi of Shelton
*Father John Finseth was murdered*

Kenneth Fredeen of Monroe
*Aunt Virginia Brace was murdered*

Bart Gassinger of Woodbury
*Sister Lisa Gassinger-Melo was murdered*

Drew Harris of Cheshire
*Aunt Marian Harris Evans was murdered*

Laura Harrison of Manchester
*Aunt Colletta Tripp was murdered*

William Harshaw of New Britain
*Son William Harshaw Jr. was murdered*

Jeff Israel of Bristol
*Granfather Bernhart Theise was murdered*

Pamela Joiner of Hartford
*Son Jumar Joiner was murdered*

Paul Labounty of Willimantic
*Cousin Donald John was murdered*

Carol LaBotz
*Nephew Thomas E. Otte was murdered in Hartford*

Arthur Laffin
*Brother Paul Laffin was murdered in Hartford*

Fran Laffin
*Brother Paul Laffin was murdered in Hartford*

Maureen Laffin
*Brother Paul Laffin was murdered in Hartford*

Cheryl Machado of Willimantic
*Uncle Tommy was murdered*

Janna Marazita
*Brother Scott Everett was murdered in Bridgeport*

Maria Melendez of Hartford
*Son was murdered*

Tiffany Mitchell of Hartford
*Grandfather was murdered*

Robert Nave of Waterbury
*Cousin Joseph Ricupero was murdered*

Daniel O. Otte
*Uncle Thomas E. Otte was murdered in Hartford*

David Otte
*Uncle Thomas E. Otte was murdered in Hartford*

Debra B. Otte
*Brother-in-law Thomas E. Otte was murdered in Hartford*

Elizabeth Otte
*Uncle Thomas E. Otte was murdered in Hartford*

Erin M. Otte
*Father-in-law Thomas E. Otte was murdered in Hartford*

Jonathan E. Otte
*Father Thomas E. Otte was murdered in Hartford*

Katelind Otte
*Uncle Thomas E. Otte was murdered in Hartford*

Maxwell Otte
*Uncle Thomas E. Otte was murdered in Hartford*

Michael P. Otte
*Brother Thomas E. Otte was murdered in Hartford*

Timothy J. Otte
*Brother Thomas E. Otte was murdered in Hartford*

Stephanie Papillo of West Hartford
*Aunt Valerie Papillo was murdered*

Marie Pellegrini of Plantsville
*Son Joseph Pellegrini was murdered*

Mahogany Phillips of New Haven
*Father Lavias Phillips, cousin Laron Phillips, and cousin Ricky Cooper were murdered*

Renee Robinson of Waterbury
*Grandmother Corrine Derovin was murdered*

Carmen Rodriguez of Hartford
*Son Carlos Garcia was murdered*

Wanda Lynn Short of Danbury
*Cousin Joseph Hawkins was murdered*

Cindy Siclari of Monroe
*Sister-in-law Janet Siclari was murdered*

Diana Siclari of Monroe
*Aunt Janet Siclari was murdered*

Erik Siclari of Monroe
*Aunt Janet Siclari was murdered*

Kevin Siclari of Monore
*Aunt Janet Siclari was murdered*

Kristen Siclari of Monroe
*Aunt Janet Siclari was murdered*

William Siclari of Monroe
*Sister Janet Siclari was murdered*

Carol Silva of Willimantic
*Nephew Chris Mickey Lord was murdered*

Karen Smith of Danbury
*Uncle Errol Jones was murdered*

Elizabeth Stein
*Cousin Gary Stein was murdered in New Haven*

Anne Stone of West Hartford
*Son Ralph was murdered*

Fred Stone of West Hartford
*Son Ralph was murdered*

David J. Tuttle of Woodbury
*Sister-in-law Lisa Gassinger-Melo was murdered*

Mary van Valkenberg
*Brother John and sister-in-law Nancy Bosco were murdered*

Barbara Voss
*Brother Thomas E. Otte was murdered in Hartford*

Jeremy Voss
*Uncle Thomas E. Otte was murdered in Hartford*

William Voss
*Brother-in-law of Thomas E. Otte, murdered in Hartford*

Frances Watson of Meriden
*Aunt Mattie Lee Dukes was murdered*

Deborah Zane of New Milford
*Cousin Margaret Polizzi was murdered*

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**RTRAN**

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| THE STATE OF NEVADA,<br>Plaintiff,<br>vs.<br>DAVID BURNS<br>Defendants. | CASE NO. C267882-2<br>DEPT. NO. XX |

BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

THURSDAY, SEPTEMBER 12, 2013

***RECORDER'S TRANSCRIPT OF DEFENDANT'S MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444***

APPEARANCES:

| | |
|---|---|
| For the State: | MARC DiGIACOMO<br>PAMELA WECKERLY<br>Chief Deputies District Attorney |
| For Defendant Burns: | CHRISTOPHER R. ORAM, ESQ.<br>ANTHONY P. SGRO, ESQ.<br>MEREDITH WEINER, ESQ. |
| Also present for Codefendant Mason: | SUSAN D. BURKE, ESQ. |

RECORDED BY: SARA RICHARDSON, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 12, 2013, 10:45 A.M.

* * * * *

THE COURT: State versus David Burns, C267882. Hang on one second -- do you guys need a break?

THE RECORDER: Yes.

THE COURT: Let's take a short break, my staff needs just a quick restroom break, all right?

[Proceeding trailed until 10:51 a.m.]

THE COURT: -- is present in custody. Did they not move Mr. Alonso out? Do you guys care if he's here or not? He's the --

All right, this is on for the defendant's motion to strike the State's notice of intent to seek the death penalty. You can go ahead and have a seat Mr. Burns, apparently we're going to be here for a few minutes, there's no reason to have you stand the entire time.

All right, on behalf of your client?

MR. SGRO: Thank you, good morning, Your Honor. Anthony Sgro on behalf of Mr. Burns.

THE RECORDER: Can I ask one more thing? Will you move that microphone, it's behind the computer, can you move it --

THE COURT: Oh, yeah, you're getting blocked, right.

THE MARSHAL: Just move it over in front of the sign.

THE RECORDER: That's perfect, thank you.

THE MARSHAL: There you go.

MR. SGRO: Is that okay?

THE RECORDER: Perfect. Yes.

MS. BURKE: And, Your Honor, if I might, Susan Burke on behalf of Mr. Mason. Because Mr. Mason is subject to death-qualification of the jury and that sort of thing to that standpoint, we would -- would join in the motion, although we're not officially joined in the motion.

THE COURT: Okay. Mr. Sgro, let me, you know, start by, maybe I can focus you a little bit. I -- in this binder of materials that were exhibits to your motion you have all this stuff from other states.

MR. SGRO: Yes, sir.

THE COURT: But why does that matter to me what other states do or don't do?

MR. SGRO: Only as a -- as a template for what the legislators in Nevada have done, we have oftentimes, "we" being the legislature, has oftentimes looked to guidance from other states. We do it in our jurisprudence, and we do it when it comes to making law. We look to federal authority. We look to the federal --

THE COURT: But, I mean, of all the states in the country Nevada is the one that on certain things we don't care. Forty-nine other states have outlawed prostitution, not us. Until about ten years ago, 48 other states, other than New Jersey, had outlawed gambling. So this is the one state where we have a history of really not giving a damn of what the other 49 states are up to. So why should that matter in what -- on this issue what other states are doing?

MR. SGRO: Well, I will tell you, Your Honor, the legislative history that the Court's going to be asked to consider when we conclude today's proceedings, includes comments on what did happen in other states. So from a legislative history standpoint, the other states were relevant at the time testimony was taken, when the -- prior to the bill being drafted. So I think, while Nevada may or may not care,

Nevada also affords its individual citizens additional rights beyond those afforded to its citizens via the federal constitution. So, Nevada --

THE COURT: Right. We're one of the few states that you do actually, where the rules of evidence apply to prelims, for example. California doesn't do that -- most states you just allow hearsay in, police officer comes in he just reads a police report. We're one of the few states that chose to do it differently. So, I guess, you know, the question again is, we're the one state that really doesn't care what everyone else does.

MR. SGRO: If the legislators had talked about it, I would absolutely see your point and most likely this presentation would be a lot shorter. However, the call of the question today, Your Honor, is we're going to ask you to interpret legislative history a certain way, and inherent in that will be the -- will be the perspective relative to what other states have done.

Also, Your Honor, it is going to show a consistency in what we believe the audit will demonstrate relative to the fiscal impact.

THE COURT: Well, but, okay, essentially let me just -- it seem -- what you want me to do is you want me to strike the notice of death penalty or stay the case because the legislature might do something in the future, right? I mean, that's essentially what you're asking for. So you want me to predict what the legislature -- which, you know, and here's the other thing, okay, we have a biennial legislature. It doesn't sit again until 2015. There's an election between now and then which means we don't even know who the legislature is going to be and we don't even know in theory who the governor is going to be in the next legislative session. But you want me to sort of guess what this unelected legislature, this unelected, unknown governor might do in the next session is kind of what you're asking me to

do.

MR. SGRO: No. No, I'm not, Your Honor. I'm not asking you to guess as to any of that. I think that there are signs there. I think the call today deals with a statute that we don't have to guess about. We have a bill that was passed in May of this year. The bill that was passed calls upon the State of Nevada representatives to determine the fiscal impact of the cost of the death penalty. The bill is silent as to what happens to the cases that are pending insofar -- during the time within which the audit is taking place and until the time that conclusions are being made.

So, I'm not asking the Court to guess what they're going to do, I think I know what they're going to do. But my guess is only as good as a guess. What the Court has to do is determine legislatively, based on the legislative history, what is the most probable policy outcome that the legislators intended insofar as the statute is silent. That's why we're here today.

THE COURT: Well, I'm not sure -- legislative history, okay, typically when courts look at legislative history, they're looking at it for a specific purpose, there's an ambiguity in the statute.

MR. SGRO: That's correct.

THE COURT: It's a statute that's, you know, I'm not sure how to apply it, so I have to look at the history to see what the legislature intended.

MR. SGRO: Correct.

THE COURT: There isn't actually a law that says the death penalty is no longer the law in Nevada and we're trying to sort it out. You want me to take legislative history and use that to predict what the legislature, which again has not yet been elected and the governor whose not yet been elected, might do in 2015, maybe not even 2015, I don't know what the legislature's going to do, maybe 2017.

So we're talking a whole different legislature with term limits and that kind of stuff. I mean, what's the focus of -- what I'm -- you know, legislative history, you look at it for a specific purpose to interpret something. What's the point of just looking at this? To determine what? To determine what the legislature might do in two years?

MR. SGRO: No, no, Your Honor. I think, perhaps I'm being inartful in what I'm trying to communicate to the Court. Here's the situation, and I do have the presentation which -- which I would like to develop for purposes of the record, Your Honor. But the bottom-line is this, the legislature has taken a look to see if we can still afford the death penalty in the State of Nevada. It is a luxury, that's the word that has been used -- it's a luxury which we are start -- we need to determine whether or not we can still afford. So we don't know if we have the money to pay for it any more.

And I would tell Your Honor that we have already in our state a de facto moratorium. And those are the words that were used by the -- by the assemblyman who chaired this committee who is Assemblyman Ohrenschall who was present on Tuesday when we presented this in front of Judge Herndon and who told me that he didn't know if he could make it here today, but is available by phone if we need to contact him. The bottom-line is this, Your Honor, we don't have money in our state to continue to pay for this is my view.

The legislature has to move initially by audit, like many other states did as we provided to you in the pleadings. That audit will reveal what everyone in this knows -- in this room already knows to be true. The audit will reveal that the death penalty is inordinately more expensive to prosecute than a non-capital case. So my position is that the State can proceed on every case that they have currently in the system on a non-capital basis as opposed to proceeding now capitally because

here's what -- here's what I think --

THE COURT: But here's the problem, let's say we do that, I strike the death penalty now because of what I think the legislature's going to do and I'm wrong, they get this audit back whenever it comes back, next year or whatever it is, and they never do a thing with it, ever, you know, a lot of legislative reports just go in to committee and they die there. That's just the reality of the legislative process. So what, we never proceed on the death ever because the legislature at some point in the near future might or might not do something?

MR. SGRO: I don't know, Your Honor. But what's worse proceeding in that fashion where we maybe save our community 20, 30, 40, $50 million? Or proceeding in a fashion where we proceed with full force on every capital litigation in our community only to have it be unwound later and we do it twice? So not only can we not afford it, let's do it twice so we can flush even more money down the drain.

The difficulty with that type of analysis from my standpoint, Your Honor, is that we have been told that the legislator's going to do -- that the legislature's going to do a study. Now, it's been publicized that they're going to do this study, they've commissioned people, they're spending money on it. I don't think it makes sense to assume that after all the work they went through to get the bill passed, to commission people and pay people to do a study, that they're going to come back and say, you know what, the death penalty's really expensive and Nevada can't afford it. Okay, great, what do you have next? I just don't --

THE COURT: Well --

MR. SGRO: -- think that that's the outcome, and I think you've got to balance between -- between doing this twice and the alternative would be staying -- staying proceedings relative to the imposition of capital punishment. The worst thing that

happens, Your Honor, is there is a slight delay. And I say slight delay because quite frankly, I know that you have a case in front of you with us that is a little older, but two years in the realm of capital litigation is not that much time. And in the grand scheme of things, this is -- this is an issue that is more global than it is case-specific. And I know the Court recognizes that. But I'm asking you, Judge, in this case do you want to continue to have us pay for the mitigation experts, for the mitigation specialists, for the protracted trial proceedings to have two lawyers here instead of one, et cetera, et cetera.

THE COURT: Well, I mean, cost -- all right, let's -- you know what else is expensive? The war on drugs is expensive and something like 19 or 20 states have legalized marijuana, the Justice Department just announced they're no longer in the business of prosecuting marijuana even though under federal law it's still illegal. So the trend is pretty clear. Should I just start dismissing every marijuana case in order to save money? Because it's still illegal in Nevada, I mean, should I just do that?

MR. SGRO: We can have -- we can have that conversation on another day. But the trend for death penalty cases is also clear. In the last ten years, Your Honor, six states have eliminated the death penalty. Every one of those states found cost is a factor. Some of them found cost to be the only factor. Some of them commented on a broken system where they had one execution in 52 years and they spent $200 million to get it.

THE COURT: Right. I understand that. But here is the question, we don't know if Nevada's going to do that, and if they do that, then obviously I'm, you know, striking the death penalty notice if they do it. But we don't know that they're going to do that.

MR. SGRO: So then here's your record, Your Honor, here's the record in this

case. And again, I still want to do the presentation because I want to -- I want to perfect the record in this case. And I understand the Court's view, but at the end of the day, you're going to have two equally unpalatable decisions, okay. Decision one, delay this case if the State insists on proceeding in this case as a capital case, okay, that's decision one. Decision two, try the case, and then what you're doing is you're making the assumption that nothing is going to change. When I have had assurances from the assemblyman who wrote this bill and maybe -- maybe he sees the glass as half-full --

THE COURT: Who, because there's an election next year, may or may not be in office four years from now.

MR. SGRO: Maybe he's not, but maybe he is, Your Honor. I guess, I would take a more careful approach when I'm trifling with people's lives, and I'm trifling with the money that we have -- that we don't have that we continue to spend. The difficulty in this case, Your Honor, is this is supposed to be a dispassionate, logical analysis. So no matter who's in office, the commission's already been put into play to do the audit. Okay. So we're spending money as we speak to find out how much money we're spending on the imposition of capital punishment.

We've had one person in our state executed in 35 years. We've spent hundreds of millions of dollars to get that one execution. We today don't have a functioning death chamber, and so even if we go forward with the trial in this case and we get the death penalty and so that is equated by the legislatures who do this as a dispassionate analysis, a success. They successfully got the death penalty in this case. So what? Where's he going?

And that is the -- not -- that is the gravamen of what the audit's supposed to study. We don't have anything to do with the person convicted of death

row and put on death row other than we've got to -- we get to pay a lot more to keep him housed in a much more expensive facility. We get to pay a lot more for a decade-plus worth of appeals. We get to pay a lot more for mandatory review all the way to the United States Supreme Court. That's the only thing we're going to accomplish if we continue to move forward.

Our position is a much more conservative view which, by the way, you as a judge, Your Honor, have to decide public-policy issues. It's no different then me just taking $20 out of your pocket and throwing it in the trash because all we're doing right now is we're wasting money.

THE COURT: Well, the problem is, I don't get to just rewrite laws or ignore them because I think the legislature might do something about them. I mean, I deal with statutes all day long in the criminal world, in the civil world, at any given moment, at any given legislative session the legislature could change any law that they want to choose, that's what they do. Their job is to write laws, to rewrite laws. But you don't take every case on my docket and say, well, this law could be rewritten, that law could be changed, this law could be repealed. I don't know what they're going to do and you just don't do that. The law is what the law is now, and because, you know, I mean, sort of extrapolating your argument to the -- to the, you know, to the logical extreme, I would stay every case on my docket because at any given moment, the legislature might repeal that law.

MR. SGRO: Yes.

THE COURT: I mean, we -- in theory the legislature could repeal, you know, literally anything, right? They can make robbery not a crime. Well, do I stay every robbery case because they might?

MR. SGRO: Judge, the difference is, the difference is is that if you had a bill

in front of you that said in 2015 we may not have robbery as a crime any more, okay --

THE COURT: But that doesn't say that, We're studying whether to have it, that doesn't mean they're going to.

MR. SGRO: And this is what every state did, you asked me the relevancy of other states that were -- and I told you that they were spoken of in the testimony prior to the bill being passed -- every other state started somewhere down this road. Every -- every state had some audit process prior to the abolition of the death penalty in the last decade, the six states that abolished it. Every state came to the same conclusion, the death penalty costs more money. Every state found, you know what, for the bang we're getting for our buck, we can use money in different ways.

Victim advocacy group -- victim family members, victim family members drafted a letter to the legislators in Connecticut -- if I could have just a second, Your Honor -- the letter -- the letter says, "The reality of the death penalty is that it drags out the legal process for decades. In Connecticut the death penalty is a false promise that goes unfulfilled leaving victim's families frustrated and angry after years of fighting the legal system. As the State hangs on to this broken system it wastes millions of dollars that could go towards much needed victim services." And Connecticut's not alone on that front.

And I think it was Maryland that after they abolished the death penalty, they struck the -- they abolished the death penalty, then they put a special provision in their statute that the money saved from striking the death penalty went back into resources for victim family members. Do you know, Your Honor, that if you are the victim family member of someone who suffered a homicide you get $5500 for

counseling, that's what you get in the state of Nevada. And as I said on the other day when we did this, I have two small children victim survivors in a case, not this one, who were witnesses to their entire family being killed. That's the State's allegation. Those two little kids get 5500 bucks.

What I'm telling you is, we're in an economy right now where our unemployment rate is three times the national average. There's an article in today's paper, in today's paper, the headline of the business section says, "Local foreclosure starts surge." They expect more filings in the state of Nevada for foreclosed homes in the next 45 days than they've had in the last year. This cannot be tunnel-vision-type of issue, this has got to be an issue where you as a jurist have to look at a bill and say, listen, here -- here's how my argument doesn't make sense, Your Honor, my argument doesn't make sense if in that bill they said, Pending cases need to move forward. Okay, you know what happened --

THE COURT: But they don't say pending cases should be stayed while we do this study, right?

MR. SGRO: Exactly, that's why we're here because they don't say either. And I -- let me point out one other thing, Your Honor.

THE COURT: But here's the thing, I mean, this is my concern as you can probably guess from my questions, all of this is just a policy argument and I'm not a legislator, I'm not writing laws, I'm not --

MR. SGRO: The cases --

THE COURT: -- you know, hang on, courts have a very limited role in government, okay, we don't write laws except as to common law perhaps.

MR. SGRO: Right.

THE COURT: But as to statute law, when the legislature acts to draw -- to

draft up a statute, we defer to the legislature because they have things that -- they can do things that we can't. I can't have a committee hearing. I can't have public comments. I can't have legislative studies done. I don't make findings on legislative facts.

MR. SGRO: But you have the obligation, the absolute obligation --

THE COURT: Based upon -- here's the problem --

MR. SGRO: -- to interpret -- to interpret the law.

THE COURT: -- this is why, I'm just telling you, this is why philosophically courts don't do policymaking, based on what? Based on information that you, one person in the world, gave to me. I can't do a neighborhood meeting and have a million people come in here and give me their opinions. I can't do broad studies. I don't have committee hearings. I can't subpoena a million people like the legislature can on both sides of the issue and have them present both sides of the issue. What this is is this a case --

MR. SGRO: Well, Rosa Park was --

THE COURT: Hang on. There's one lawyer here, there's one lawyer there, that's all I'm hearing from.

MR. SGRO: Okay. Then this lawyer here --

THE COURT: That's the diff -- that's the difference between me and the legislature is that's why the legislature does broad decisions because they can have broad evidence brought before them and I can't. This is a case.

MR. SGRO: I would like --

THE COURT: Everything in this case is subject to rules of evidence. And the evidence -- rules of evidence don't allow me to hear, for example, what Joe Schmoe on the street thinks about the death penalty or what every advocacy group here,

what their position is on the death penalty or, frankly, there's a reason why the legislature did this study, I can't even order that study. We don't have the resources in the judiciary to do studies like that. That's not what we do in the court system.

And that's why, on decisions based on that study we defer to the legislature because they have tools that we don't have.

MR. SGRO: We cite --

THE COURT: And in fact, that we're prohibited from doing. I just can't do that stuff, I can't hear hearsay testimony from a bunch of neighborhood people, but the legislature can. And that's why they're the ones who make that decision.

MR. SGRO: I think you can have an evidentiary hearing. I think you can -- we can subpoena witnesses.

THE COURT: From who? It's a bunch of hearsay under the rules of evidence, that's the --

MR. SGRO: Your Honor, when it comes to --

THE COURT: -- that's the problem, the tools that we have don't fit with broad policy decisions. A guy comes in here and -- say some lobbyist wants to come in and tell me his opinion about the death penalty, how is that even admissible under the rules of evidence? It's just some guy's opinion.

MR. SGRO: That --

THE COURT: It's technically speaking, if they raise an objection, sustained, I don't get to hear that. But the legislature can.

MR. SGRO: Assemblyman Ohrenschall, what was your intention when you crafted this bill relative to the death penalty?

THE COURT: Objection. Sustained. You know why? Because the subjective intention of any individual legislature is not relevant.

MR. SGRO: Okay, then --

THE COURT: Only the legislative history as printed is. Objection sustained.

MR. SGRO: Okay. Here's -- here's -- here's an issue for the Court, Your Honor, we gave you three cases in our brief. And it's and I'm just going to pick one. This one is *State versus Lucero.*

THE COURT: But do you understand my point? The problem is you're making arguments here that I -- not just me individually, but as the court system, we're not equipped to deal with them. We don't have the tools. The legislature does, we don't. They could subpoena a million people, you know, you've seen it if you've been up to Carson City, a whole table full of ten people who are experts in their field just offer their opinions and there's a discussion.

MR. SGRO: Judge, this --

THE COURT: We don't do that here.

MR. SGRO: -- this is not a symposium on the right or wrongs of the death penalty. I came to you because you, according to the *State versus Lucero* case and the *Catanio* case and the *Matamoros* case, here's what the stat -- here's what the case law says from the Nevada Supreme Court, "When interpreting a statute, legislative intent is the controlling factor," and I'm asking you to interpret a statute. The case goes on, "the starting point for determining legislative intent is a statute's plain meaning," okay, I'm going to continue on, "when a statute is clear on its face a court cannot go beyond the statute in determining legislative intent. We must attribute the plain meaning to a statute that is not ambiguous. But when the statutory language lends itself to two or more reasonable interpretations a statute is ambiguous and we may then look beyond the statute in determining legislative intent. To interpret an ambiguous statute, we look to the legislative history and

construe the statute in a manner that is consistent with reason and public policy."

THE COURT: Right. And the statute we're talking about here is a statute ordering a study. Okay. I find based on the legislative history, it's very clear what the legislature is doing, they're ordering a study. So what?

MR. SGRO: Okay. I -- I don't mean to interrupt, but I want to make one point before we move on, Your Honor. The legislative history relative to a study in our view is an over-simplified view of the -- of the context within which this bill was passed. I will tell you attached to our brief was the -- were the minutes that pre-dated the passage of the bill. And inquiry was made relative to a remodel, it's called Project 13-C02, Remodel Administration Building to Accommodate Execution Chamber, Ely State Prison. That was the funding that was sought. Assembly Bill 444 requires that a legislative audit be conducted on the death penalty in the state which would include a review of facilities to carry out a death sentence. In other words, we're going to see if it's even necessary.

What they do, Judge, Senator Smith moved to not approve capital improvement project 13-C02. Assemblywoman Carlton seconded the motion, the motion carried. Now, if that's not indicative of legislative history of where they think they're going, I don't know what else would be. They specifically took a vote on whether or not to fund the death chamber and that vote was -- or that motion to fund was denied. So they think in the legislature more than this is just a study, we may not even be back here in a couple years, they actually think this is a sign of things that are going to come down in the future.

I just read to you one of three cases that imposes upon you, Your Honor, the obligation to look at the legislative history to make a determination -- now if your -- if your finding is that the leg --

THE COURT: But here's the thing, the rules, yeah, there are a -- there's a whole body of rules that go back 100 years on how you interpret a statute. But there's a purpose --

MR. SGRO: The case I read from is 2011.

THE COURT: There's a purpose to that. You use those rules of legislative history in order to determine what a statute says. You don't use the rules of legislative history in order to project out what you think the legislature might do in the future. That's not what those rules are for. Those rules are eye of a statute that applies to some case, say it's a validity of a foreclosure, an illegal foreclosure, well, there's a foreclosure statute, somebody says, well, this statute might permit that. So I look at the statute, does it permit that? Yes, it does; or no, it doesn't based on the legislative history.

What I don't do is say, well, the legislative history, you know, says this; therefore, I'm going to predict that the legislature in five years is going to change this law; therefore, I'm dismissing this case. You absolutely don't do that. And that's not what the rules of statutory interpretation are for.

MR. SGRO: Your Honor, I think in that -- in that scenario, presupposes that we don't have a snapshot of what's to come. You're presupposing that nothing may occur.

THE COURT: Well, let me ask you this --

MR. SGRO: In the face of a bill --

THE COURT: -- if what you're saying is true, if what you're saying is true, why even do a study? Why didn't they just outlaw the death penalty last session? If that's -- if you're so sure that's where they're going, they could have done that, right? They're the legislature --

MR. SGRO: Because -- because --

THE COURT: -- why didn't they?

MR. SGRO: -- in my humble opinion, and I have no evidence of this, but I would suggest that there are a body of D.A.s that cavalierly say, well, we don't know how much more it costs.

THE COURT: Because here's why I ask that question, there's a rule of statutory interpretation that says this, you look at what the legislature did, you also look at what they had the opportunity to do and didn't do, that's a settled rule of statutory interpretation.

MR. SGRO: What didn't they do, Your Honor?

THE COURT: They didn't abolish the death penalty.

MR. SGRO: That's not true. I disagree with you. They -- they absolutely -- is anyone going to get executed between now and 2015 when they go back?

THE COURT: That's not the question. That's a question of practicality. The question is they could have abolished --

MR. SGRO: Judge --

THE COURT: -- the death penalty. They didn't. So if you're going to apply the rules of statutory interpretation, which first of all you can't because we're out of the context of interpreting a statute for a purpose. But if you're going to interpret it that way, there is a rule that says if the legislature had the opportunity to do something and didn't, you must presume that that was an intentional, conscious, and deliberate decision.

MR. SGRO: Then why isn't the intentional, conscious, deliberate decision, the opportunity for the legislature to say all the pending cases need to move forward, regardless of this study? They didn't do that either.

THE COURT: Because that's not a law. Cases move forward anyway. That's not even a thing.

MR. SGRO: Your Honor --

THE COURT: That's not a bill that they -- how is that even a statute they can enact? We hereby rule that all cases in the court system should be handled in the normal course --

MR. SGRO: They did --

THE COURT: -- of things? That's not even a law.

MR. SGRO: -- they did it in the state of New York. They did it in the state of New York via Supreme Court. They actually said in their opinion, all cases currently pending in the system are hereby now going to proceed as life-without cases. So they could have done that, Your Honor, because we don't have the guidance. And what I'm telling you, Your Honor, is the reason they didn't do what you think they could have or should have done is because they didn't need to. They had the de facto moratorium in place already. Why bother with additional language when you've already told the persons at the prison they're not going to get funding for the death chamber?

THE COURT: Well, why bother with a study if you're so sure they're going to abolish it?

MR. SGRO: Because --

THE COURT: Why not just abolish it?

MR. SGRO: -- because that's the way it works, because I don't think public, the public is aware of how much it costs. I don't think the public knows that one of the reasons we have more kids in our classrooms than they do in other states is because we don't have the money. And I don't know if they know that if we had

additional money from another source that we could have smaller class sizes or maybe have music programs back in high schools or maybe get 2,000 teachers, get some of them back on the payroll.

THE COURT: Right, again --

MR. SGRO: We have been cutting, cutting, cutting.

THE COURT: -- here's the problem, none of that has anything to do with me. I -- just because I don't think music classes are -- are being run well enough, I can't just manipulate the statute to do that, that's a policy decision.

MR. SGRO: They're not being --

THE COURT: But that's essentially what you're asking me to do is, I -- because I --

MR. SGRO: That's exactly right.

THE COURT: -- because you think the death penalty is going to be too expensive, and by the way, we don't have -- actually have the results of the study, but we're just guessing that's what it's going to say.

MR. SGRO: We know what other states have done.

THE COURT: And you're probably right because it probably is going to be more expensive, but let's assume for a second you're right, you want me to manipulate the statutes to say, well, this is what I think the legislature should do as a matter of public policy; and therefore, I'm just going to do it before they do it is essentially what you're saying.

MR. SGRO: No. No, I'm not, Your Honor. I'm not saying music programs are run well or run bad. I'm saying they don't exist because they got cut for funding.

THE COURT: But I can't order them to just exist because I like them.

MR. SGRO: No, of course.

THE COURT: I'm not a legislature.

MR. SGRO: Your Honor, again, I'm maybe not communicating the point effectively, the point of the matter is this, we have year by year by year, especially since the crash in late 2007 through 2008, we have cut everything in our state. We have fewer teachers, we have more kids in the classrooms, we have fewer programs in the school, we have a ceiling on victim-witness monies, and it goes on and on and on what -- where we have cut. And we're looking now at projections of hundreds of millions of dollars over the next couple of decades and whether or not that money could be spent elsewhere. Those are policy decisions which you are called upon to consider in determining legislative intent. We have a legislature --

THE COURT: Well, here's the other thing, how --

MR. SGRO: -- Your Honor, please, I would like to make my record.

THE COURT: -- hang on, how do we know that if the study comes back the way that you say, that the death penalty as it is is too expensive, how do you know the legislature's not going to say, okay, there's an easy way to make it cheaper? Let's just execute everybody right now. We're going to abolish the post-conviction process in the state of Nevada, that would save a million dollars, how do you know they're not going to do that?

MR. SGRO: Because that would be phenomenally realistic -- unrealistic, I mean, to say let's just --

THE COURT: Well, I mean --

MR. SGRO: -- kill 'em all.

THE COURT: -- here's my -- here's my --

MR. SGRO: I understand 200 years of jurisprudence, but now let's just execute them all.

THE COURT: -- once we're in -- here's the thing is, once we're in the realm of speculating on what they might do, why is that not something that's a possibility? Because as long as we're speculating, let's just speculate, right?

MR. SGRO: Because the level -- the level at which that last hypothetical is based is based on a speculation that I'm going to walk outside and fly out to the moon and have lunch with my kids and then come back for dinner. That's the level of speculation. The level of speculation that exists in the study is based on concrete evidence that we have a couple things that have taken place. One, the bill was passed; two, there's no funding for the death chamber, they accomplished their moratorium in the legislature; three, they're going to come back and I don't think anyone with a straight face is going to say the death penalty doesn't cost more money than a non-death case. I'll tell you right now as soon as Burns, if Mr. Burns's case was not death any more, I don't remember if Chris got this case of I did, but one of us is gone.

THE COURT: Sure. Because you're --

MR. SGRO: Okay?

THE COURT: -- of course, look --

MR. SGRO: There's no, I know that that's going to happen.

THE COURT: I'm accepting that it's probably -- the study is probably going to reveal that death penalty's more expensive.

MR. SGRO: You keep saying probably, I don't understand where probably's coming -- there's no mandatory -- there's no mandatory review to the U.S. Supreme Court any more.

THE COURT: I say probably because the study has not been done, period.

MR. SGRO: But you're a jurist.

THE COURT: Is that not clear?

MR. SGRO: But you're a jurist, Your Honor, you see these cases in your courtroom all the time. When's the last time you had a mitigation specialist come in and testify at a life-without case? Or you heard of a life-without case getting mandatory review on a petition for certiorari to the U.S. Supreme Court? That doesn't happen. We know that. We know that the decades of frustration that these victim's family member feels -- feel are due to the protracted federal litigation proceedings. And here -- let me give you another example, Your Honor, you said what if changes. What if, Judge, the legislature said, you know what, we're going to keep the death penalty but the D.A. now has to take three cases a year and that's all they're allowed to prosecute. You know what happens? Now -- now the D.A. actually has to pick, quote, unquote, "the worst of the worst." Instead of hearing in every case that I ever have, I always end up with the worst of the worst guy apparently because I always hear that argument in every case and we all know it's not true.

The other thing that could happen is they might eliminate some of the aggravators. Defense attorneys have been banging the drum for years that the aggravators that we have in our statutory scheme are overbroad and are theoretically inclusive of everyone. What happens if they knock out some aggravators that Mr. Burns has? What I'm suggesting, Your Honor, is that there's going to be a change that happens. We are in a fiscal state where a dispassionate analysis is going to say we spend more money on death cases, we need to change something, so it may not be unfettered discretion of the death penalty committee that changes, it may be the lessening of aggravators. But I'll tell you, you have an attorney in this one case, this one guy in the world as you put it earlier that's saying

his client is going to potentially benefit from what's going to happen in 2015. Now what happens? Before -- between now and 2015, we're forced to go to trial. He gets convicted and then the death penalty. Then what? Then an aggravator changes and we're all back here again.

THE COURT: But the problem is we don't know if it's 2015 or 2017 or the year 3000. We have no idea. But the problem is you want me to just say that what the legislature's going to do, who the legislature even is, who the governor is, and when they're going to do it are so clear and they're going to happen so imminently that it's going to affect this case as opposed to them doing it 10 years from now, 20 years from now, 30 years from now, 100 years from now. That's --

MR. SGRO: I'm saying --

THE COURT: -- kind of what you're saying is that's why you want a stay. A stay suggests that you think something's going to happen reasonably imminently as opposed to ten years from now.

MR. SGRO: Right. And Judge --

THE COURT: And I'm asking you, given the fact that we haven't even had the election, we don't even know who the legislature is, what makes you think that?

MR. SGRO: Judge, why don't we then revisit it in 2015 if that's the concern? If you're going to agree with me that if the same incumbents are going to win that are there now that sponsored this bill and that the extreme majority -- this bill passed 38 to 1, by the way, 38 to 1.

THE COURT: And all --

MR. SGRO: So the level of change --

THE COURT: -- and every assemblyperson is up next year, every single one.

MR. SGRO: Okay. The level of change --

THE COURT: Now, granted -- granted, there hasn't --

MR. SGRO: -- would have to be pretty dramatic.

THE COURT: -- granted, there's most of the time, most incumbents win, but we don't know that all of them are going to win. But my point is what this is is essentially it's speculation on speculation on speculation. It's prediction on prediction on prediction. I understand exactly what you're saying and you may be right. From looking at this study, looking at the legislative history, it looks like they're at least seriously considering abolishing the death penalty. But that's not what judges do. We don't sit here and say, this is what I think they're going to do in the future. I took an oath to administer the law as it is today.

MR. SGRO: I think --

THE COURT: And as we stand here today, the death penalty's on the table with the aggravators and mitigators that we have. And in fact what you're asking me to do is because I think the legislature may change the law, you are actually asking me to violate the law because I think it's going to be different.

MR. SGRO: No, I'm not, Your Honor. Staying the case, how does that violate the law? I'm asking you to stay --

THE COURT: Because there's no legal grounds for a stay. The law provides the grounds that -- on which you can grant a stay. And speculating on what the legislature might do is not one of them.

MR. SGRO: Okay.

THE COURT: Unless you can cite me a case that says that, it's not one of them.

MR. SGRO: But we have an affirmative obligation to defend against the death penalty. Our obligation right now is to make sure we find out what the study

says. You may be right, Judge, out of 30 -- 38 out of 39 legislators voted to approve that bill --

THE COURT: No, here's the thing, look, this is what I'm saying, you're probably right. Most of the legislators -- I'm, you know, obviously, I'm not a political professional. My guess would be Brian Sandoval's going to be reelected. My guess would be the vast majority of the legislators are going to be reelected, that's just the way it works, right? You're probably right in that at least in 2015 they're going to consider abolishing the death penalty. I don't know if they're going to do anything in 2015 because, you know, every session has relevancy and they have -- you know, they spend half of it on the must-pass bills, the budgeting and appropriations and all that kind of stuff. On a death penalty case they may want to take more than one session, they may want to have working group studies, committees, that's what they do. So I don't know if it's 2015, 2017.

You're probably right in that the -- in fact, you're definitely right in that the legislature obviously is thinking about this issue, I don't know what they're going to do with it. Maybe they abolish the death penalty. Maybe it comes up for a vote and it's a really, really close vote and everybody's weighing in, lobbyists are everywhere, and then we have no way of knowing where it's going.

But I would probably put the odds in the neighborhood of about 50 percent that they might abolish it sometime in the next couple of sessions, not sure when, but because as I said, I'm, honestly, between you and me, I'm not sure they can do it in one session because you know everybody's going to jump out there, the press, you know, everybody with an opinion is going to jump out there. And they're probably going to at least want to hear from everybody. So I'm going to guess what they're going to do is during one of the off sessions, they're going to have a million

of these neighborhood meetings because that's what they do on controversial bills.

But let's even grant for a second that I think you're right that in the -- it's probably in the neighborhood of 50 percent, that the legislature may abolish the death penalty some time in the next five years, let's say. Okay, but even if that is true, I can't just stay things because I think that's what might happen because I can list you, you know, I know you don't probably do a lot of civil, I can list you at least a dozen civil laws that I think they need to change and they're probably going to change. But I can't just not follow the law because I think that's what they're going to do.

MR. SGRO: Right, but the difference is --

THE COURT: That's the problem with your whole argument.

MR. SGRO: And I do do my fair share of civil, and I always say the same thing.

THE COURT: Okay. I didn't know that. But, yeah.

MR. SGRO: I will say this, that's over money and they'll figure that out later. If we do something here it's going to have a much more permanent consequence where we're talking about the death penalty, number one. And I will tell you, Your Honor, I'm old enough, sadly, to have been practiced during the time of depravity of mind is no longer an aggravator.

THE COURT: Right.

MR. SGRO: Okay, I'm old enough to remember when felony murder rule was enough to be an aggravator then the case called *McConnell* came down. And now we have special verdict forms.

THE COURT: Right.

MR. SGRO: And the felony that's the underpinning of the felony murder rule

can no longer be used as an aggravator to enhance the death penalty. I'm old enough to remember when we had a three-judge panel when the jury was hung on a sentence and that three-judge panel was stricken as a violation of Sixth Amendment right to counsel. Now, here's the thing --

THE COURT: Or I'll even throw in, like, last year's Supreme Court case when they said that a jury has to decide the death penalty. You know, in some states they have the judge do it and they said you can't do that. But that almost hurts you because then the argument is, look, stuff changes all the time.

MR. SGRO: No, it doesn't, but here's the difference, I'm in front of you as one lawyer on one case on one client telling you I'm predicting a change. Now, look at the record in this case, let's do it strictly from outsiders looking in. Do we want a record in this case where we're coming to you saying, look, we read this bill, as a result of reading this bill, we're in front of you saying -- and you agree there's a chance that the death penalty gets abolished, why then, why then, from a policy standpoint do we continue to want to put the foot on the accelerator to spend money to accomplish a result which, number one, we know right now, it cannot be carried out? The death sentence can't be carried out. Assuming, for example, that Mr. Burns caught lightning in a bottle and was up and down to the Nevada Supreme Court after getting -- to the U.S. Supreme Court, I'm sorry, he got the death penalty, he was up and down in two years, for whatever theoretical reason, time for him to get executed. Yeah, we can't do it.

There's 83 people right now, 83, Your Honor, on death row that are just sitting there. And that is part and parcel of what the study's going to bear out. So you're going to have a record in this case, Judge, where the defense attorneys came to you and said, why are we proceeding forward, we don't want a capital jury in our

case. We don't want to deal with the bifurcated penalty hearing where death is an option. We don't want to do any of those things. We want to have a clean life-without case.

Now you're going to say, well, I can't do anything about it. So the change, as you put it that may be affected is going to be coupled with a precursor of this record which says we anticipate the change. So in other words, if I'd've been one of the lawyers that said you can't -- my guy's not more death eligible because of the felony murder conviction which, by the way, I did have an opportunity to argue that issue in the Nevada Supreme Court, *McConnell* came down, guess what happened with the record in that case because the record was made in advance?

Again, all we're doing, Your Honor, is we're trying to repeat doing things twice. I say things oftentimes in different motion hearings in an abundance of caution, I always ask courts to consider whether or not this is the kind of thing that's worth doing it twice. Okay.

The notion of, you know, what do I tell the victims and all those sorts of things, seem to be -- even those issues seems to be waning with more victim family member groups being on the side of we'd rather have the money for something else. Sometimes the cost of the clean up of a homicide scene exhausts the available funds that a citizen in our state gets for everything, just to clean up their home. So I think that is waning. And I think victims, the surviving victim family members would rather at least only do it once. There is no straight-faced way for anyone to tell the victims in this case that they're going to get closure after this trial. Impossible. Impossible because we don't know what the legislature will do.

I can tell you what I think the signs are, I think it's pretty telling that they didn't fund the death chamber and cited this note -- the bill as the reason. But you

can't tell me that you can tell a victim's family members, hey, we're going to do this case, whatever happens happens and it's done.

And I know there's always this theoretical conversation that may occur relative to appeal, this and that. You never know what someone's going to do ten years down the road, but we're not talking about that. We're talking about action in our state that's changing the law. And we're here before you before the law is changed saying, we think the law's going to change a certain way and we are asking for the benefit of that change. There's all sorts of constitutional provisions for that starting with the rule of lenity going all the way down to the 14th Amendment, equal protection clause, due process, Article 1, Section 8 of the Nevada Constitution, et cetera, et cetera.

So this isn't some hypothetical. We're saying David Burns has come to you, Your Honor, because he knows this bill exists and he knows what the legislative intent appears to be insofar as nothing's moving forward on death cases between now and 2015. Why then are we going to spend money unnecessarily in order to jam a square peg in a round hole? Let's get this death penalty case rolling. And then only to potentially face reversal down the road when -- if this bill changes anything relative to the imposition of capital punishment.

If it changes a single aggravator on David Burns's case, we're going to be right back here again. If it changes the scheme of how many they get to give in a year, we're back here again because we're going to argue that in 2013 instead of the two or three that we're allowed, and I'm just pulling that number out of the air, that there were 25. Judge Herndon told me on Tuesday I think he had 14 capital cases pending just in his courtroom.

THE COURT: Yeah, I think I have, like, it's like nine or something like that, I

don't even remember, but --

MR. SGRO: Okay. So, nine, and I know I'm here just on David Burns and the other eight defendants you have may think this is all a pile of garbage and may not have any attitude on this. But I'll tell you from my view, if you have nine capital cases and we wait and see the outcome and things come out my way, what did we save the State, 10 million, $12 million? And that money can be going to some other program that might actually help somebody instead of flushing it down the toilet. And not only do we waste that 10 or $12 million -- and I use that because the average cost from the other states was in excess of a million dollars per death notice. That doesn't include the cost of appeals, post-conviction relief, et cetera, just to get the conviction.

Okay. So we save 10, $15 million, that's the worst thing that happens. And -- and you, Your Honor, have a policy obligation to determine the legislative intent as a jurist. I'm not asking you to speculate, rewrite the laws, infuse your opinion as to the rights or wrongs of the death penalty. I'm asking you to consider the policy of what -- what's the -- what's the message policy-wise of moving forward on a case like this when we know the risk of reversal, in the Court's opinion, is 50 percent? If 50 percent is the right number for abolition of the death penalty. So we've got a 50-50 shot we're doing this all over again anyway.

In my opinion that number's higher, obviously I'm an advocate. The Court is not. And reasonable minds can agree to disagree. I'm going to guess the State's opinion is going to be zero

THE COURT: Sure.

MR. SGRO: Okay, so maybe --

THE COURT: But, whatever. I'm making a prediction because -- which is, as

I said at the very beginning, may not be based on anything because I'm assuming a whole bunch of things.

MR. SGRO: Of course.

THE COURT: I'm assuming I know who the governor's going to be. I'm assuming I know who the legislature's going to be, which -- and, you know, obviously in -- if the elections next year change the composition, then that -- whatever predictions you and I are making -- they don't mean anything anyway. But they mean a lot less if, for example, some other guy becomes governor next year let's say.

MR. SGRO: Fair enough, Your Honor, but --

THE COURT: But the point of this, look, here's the problem, okay, lots of things are probably going to change in the next couple years, okay. As we sit here right now same-sex marriage is illegal in Nevada. Now, we know for a fact the State Senate is moving forward to change that. And it's going to take a couple sessions because you have to go through two consecutive sessions to change the Constitution. Probably nationwide, and again, I, you know, I'm not going to say this is any kind of judicial finding, probably in about, I would say within ten years, marijuana is just going to be legal nationwide, it -- that's the way things are looking, I could be wrong.

But that doesn't mean I sit here now and say, well, I'm just going to go ahead and just do a bunch of same-sex marriages in Nevada because I think it's going to be legal next year, I'm going to dismiss every marijuana case because I think it's going to be legal in ten years. We don't do that -- that's not -- my -- my job is --

MR. SGRO: No --

THE COURT: -- to enforce the law as it is and follow the law as it is and the legislature can do what the legislature does. And if they do change all these things, same-sex marriage, marijuana, the death penalty, I'm very happy to follow what they do. But to sit here and say that, well, I think I know where things are going; and therefore, I'm just going to jump ahead of them, that's really not -- it's not what courts do.

MR. SGRO: And understand, the remedy we seek is very, very specific. The remedy we seek is one of two options. If this is a non-capital case, we're ready to go, right? I want -- I want to make sure, I'm not asking the Court to unwind anything. If this is a non-capital case, everyone's ready to go. If this is a capital -- if this is going to continue to be a capital case, then -- then these issues become relevant, and all I'm asking is for a stay. I'm not asking you to violate anything. I'm not asking you to impose your judgment anywhere other than --

THE COURT: Well, here's the problem with the stay even just as a legal principle, what you're kind of asking for, because we don't know, first of all, we don't know what the legislature's going to do, and we certainly don't know when they're going to do it. It's kind of an open-ended stay that could last a decade. And in the law you just don't do that. Stays usually are for a very specific purpose, stayed until this transaction is complete. Stayed until -- I'm trying to think of all the different stays I've issued -- stayed until, you know, stay this foreclosure until we can have a hearing on the merits 30 days from now.

MR. SGRO: I don't --

THE COURT: You're asking for an open-ended stay --

MR. SGRO: I'm not, Your Honor.

THE COURT: -- so that we can see what is being done by some body that

I've no control over, that again has not even been elected. So, it's kind of an open-ended, indefinite, we'll just wait and see when the legislature gets around to it, it maybe next year, it may be 50 years from now.

MR. SGRO: I think we'll know --

THE COURT: That's kind of what you're saying.

MR. SGRO: No, I'm not, I'm not.

THE COURT: And so my point is, I'm not -- my point is just as a principle of law, just, you know, stays -- there's a body of law that attaches to what -- what kind of stays you give, the scope of them, the duration of them, and this doesn't really even follow the law of what you're asking for. You know, forget about -- let's even forget about the question of whether you're right that the legislature's going to do something. Under the law as it applies to what a stay is and when you issue it and the grounds, the findings I have to make, this doesn't even comply because you're asking for a stay that has no timetable, that has no expiration date.

MR. SGRO: I want to make it clear, the whole point of this is is for the determination relative to what occurs in 2015. I think we will know a lot in 2015. We'll know from committee meetings, from additional modifications potentially made to this bill, I think -- or we'll have no bill any more.

Okay. Listen, Your Honor, all of us in the room have tried a lot of death penalty cases, okay, so I'm suggesting to the Court this is an anomaly. This isn't, you know, I've been -- I'm not coming to you after seven years of prolonged litigation saying, Judge, I just can't get ready for this trial. That's not this case. This case is about attorneys that do capital litigation often and regularly and Mr. Oram and I collectively have done, I think about as much as anyone else in the defense community has. This is a new day. And what -- all I'm asking the Court to do is at

least -- what's the harm in waiting 'til 2015? What would be the harm?

THE COURT: Witnesses dying, police officers leaving the state.

MR. SGRO: Okay, so let's -- let's balance that, Your Honor, against the harm of a real fiscal impact analysis here and the price of reversal. The price of reversal has got to be something you weigh that against. This case, I'm unaware of any witness issues. I'm unaware of anyone with plans to leave anytime soon. Obviously, the passing of somebody can never be predicted. But we run that risk on a case that's in the arraignment on the first floor right now that's starting the arraignment process today. We run the case -- we run the risk of that. Those risks are risks we run in every single case. And the State seems to figure out a way to still prosecute these cases every day.

And what I'm suggesting is that level of harm seems to be incidental to the level harm of getting those same witnesses through the same case twice. Again, those same witnesses and victim family members through this same ordeal twice of spending millions of dollars unnecessarily, and I'm talking about just this case, times it by nine, the cases you have; times it by 14, the cases that Judge Herndon has, and this matter's also pending in front of Judge Walsh. She has two just from me in that department.

The balance -- the balance of what the legislature's trying to do here to determine if money can be appropriated in a different -- do we need more judges in Clark County? Would that -- what would help administer justice better in our criminal justice system? More judges? Clerks? Bailiffs, et cetera, or -- so we can move cases quicker? Or more death penalty convictions which all we're going to do is line more people up in Ely State Prison with no where to go. Is it going to be a more effective use of the funds to provide funding for mental health programs that

have been slashed by as much as 80 percent in the last four years? So maybe we can get someone with a mental health problem to not commit a capital offense. Or should we continue to use those funds to do what we're doing now?

And I'm telling you, Judge, these -- these numbers from these other states, we're not talking about a couple hundred thousand dollars, which I know is a lot of money in a vacuum, but when it comes to capital litigation it's just not. New York projected $200 million over the next, it was either 15 or 20 years, to keep the death penalty just on the books. They thought it was going to take 500 million by the time they executed two people. They came out to $200 million per execution. Can you imagine what they could -- they had a D.A., the District Attorney of Schenectady County testified in front of the New York Legislature that the D.A. thought it would be better if the money was spent somewhere else.

You know, times change, Your Honor. We're at a point now where we're on the brink of revisiting seriously the imposition of capital punishment. And it took the State of Nevada getting broke, we're spoken of nationally, there are articles I submitted in our brief, NBC, *Wall Street Journal*, we're spoken of nationally as having a dilapidated economy. We're spoken of nationally on how bad we were hit in the end of 2007 when the credit market collapsed and where we're at still today, we're five years down the road and the business section headline today talks about how many foreclosures we're going to have in the next six weeks.

When I tried to hire people in 2006 and 2007, I'd have to wait six months before I could find someone to fit a job. I put an ad in for a receptionist today or a week ago, we have 300 resumes. We are in a different day today. And the Nevada economy cannot support the continued expenditure of these moneys. I'm getting paid by the hour to try to convince you to kick me off this case.

This is something -- I'd rather see my kids have music -- my kids now have a choice of Spanish, French, or Japanese. Italian's cut out of the curriculum. I'm a musician. My kids don't have music school any more. They were able to take lessons all the way through eighth grade. These are real-life things that we all as citizens have to go through. We all have kids, we're all facing the consequence of the cuts that are being made to pursue a penalty that we cannot enforce, it doesn't make any sense.

So I think the Court gets where I'm coming from. The only thing -- I want -- I want to just make the PowerPoint presentation a court exhibit, the supplemental brief as a court exhibit. Obviously, I'm going to accept whatever ruling the Court gives and this matter is pending in other departments and at some point it'll go up, so I want to make sure the record --

THE COURT: Right.

MR. SGRO: -- is perfected. So if the Court will make the PowerPoint presentation --

THE COURT: Sure, I'd be happy to.

MR. SGRO: -- I'd appreciate it.

THE COURT: Want to just mark this as a court exhibit then? We'll call it A, I guess.

THE CLERK: Okay.

MR. SGRO: So basically, Your Honor, unless the Court has any specific inquiry, our position very specifically is this, Assembly Bill 444 was passed in May of 2013. Prior -- just a day, literally, one day prior, it was passed on May 23, 2013, one day prior on May 22, 2013, requests were made of the legislature to fund the death chamber insofar as it was not constitutionally effective for carrying out the sentence

of death. That funding for that death chamber was denied. The funding was denied based on the fact that we are entering into this audit process where, at least in our view, the legislators are predicting a change in the death penalty, that change will range anywhere from abolition of the death penalty to a significant monitoring of the death penalty. The legislative history of this bill speaks of financial cuts that the State of Nevada has had to make and whether or not the moneys appropriated currently for the pursuit of capital punishment justify the pursuit of capital punishment insofar as there could be no remedy at the end of the case.

The specific request being made then is consistent with the legislative intent. We are asking this Court to interpret what we see ambiguous statute because it does say whether we can or cannot proceed with capital litigation. We are asking the Court to interpret what we deem as an ambiguous statute to suggest that this case, the State of Nevada versus David Burns, should be stayed pending the outcome of the legislative session in 2015.

We are not asking for a decade-long stay at this time. We're asking only to go to 2015 where we will be much more educated and have much more knowledge than we have now, all this being done so as to avoid to have to do this same exact case twice. The Court has seen the litigation in this case and I know I set aside I think either five or six weeks for the trial in this case. It's been difficult -- and parenthetically, Your Honor, some discovery issues came up within the last two days which may now affect the trial date even that we have, even after the rigorous road we've taken to get to the trial date we have now.

THE COURT: Even after the, like, two-hour hearing we had on the discovery? Is this some brand-new thing?

MR. SGRO: It is, Your Honor.

THE COURT: But, I don't know, okay.

MR. SGRO: It is, Your Honor.

THE COURT: I don't know what it is so I'm assuming there's a motion out there that's coming up, but I don't know.

MR. SGRO: As I indicated earlier, Mr. DiGiacomo, actually, Ms. Weckerly, Mr. DiGiacomo, and I were all in court together on Tuesday and my understanding is that there has been a recent production in the last couple days. But we will get there when we get there.

THE COURT: Right. Okay.

MR. SGRO: My only point is this, it's hard enough to get -- I would guess that between Ms. Weckerly, Mr. DiGiacomo, they've got murder trials stacked from here through the next 18 months, it's difficult to get all the parties in the same room, particularly in a multi-defendant case, to do it once. I don't see any policy reason to try and jam this down everyone's throats when we know the likelihood is we're going to do it twice. And I'll submit it, Your Honor.

THE COURT: All right, State, anything to add?

MS. WECKERLY: Just briefly, Your Honor. This is the third time I've heard this motion in the last month, it was denied by --

THE COURT: Well, apparently you're going to hear it again at least one more time.

MS. WECKERLY: Yeah. It was denied by Judge Cadish, and it was denied by Judge Herndon. This Court's already touched upon the -- the defects in a motion such as this. The defense is essentially asking you to put language in a statute that just isn't there. All the bill is is to do an audit on the cost of the death penalty. And regardless of, you know, whatever that outcome is, respectfully, this Court is not the

legislature. This Court doesn't get to supersede Nevada voters or their representatives and abolish the death penalty. There's no legal mechanism for a single trial court to do that.

And because of those reasons, as the Court's discussed at length with Mr. Sgro, there's simply no proper legal basis to grant this motion or issue a stay in this case.

THE COURT: All right, here's the thing, Mr. Sgro, nothing you've said here is wrong. I've read the same studies that you have, I've, you know, seen what happens in other states, and, you know, I agree with you when the study comes back, it's probably going to say the death penalty costs, I don't know what the dollar figures are, but substantially more than any other type of murder prosecution. I mean, that's just what the reality is.

But having said that, that doesn't necessarily mean we know what the legislature's going to do. You know, even if it comes -- it's probably more likely than not, in fact, almost to a certainty it's going to come, the study's going to come back and say the death penalty's more expensive. The question is, is it so much more expensive that it outweighs any possible benefit that we as a community get from the death penalty, that's -- that's what we don't know. You know, if it's only ten percent more expensive than a typical murder case, the legislature may well just say, well, considering what we get from it, maybe ten percent is not that big a deal. If it comes back as 10,000 percent more expensive than a typical murder case, then maybe the legislature is at least more likely to say, yeah, that's not worth what we get from it, we're going to abolish it, but we don't know that.

But let's even say that it does come back and say that it's significantly more expensive, which based on studies from other states that I've seen and that

you've showed me, it probably is going to. I mean, that's just what it is. We all know, you've got -- like you said, there's two of you here as opposed to one of you, there's the mandatory appeals, there's all this kind of stuff that you guys get that -- and you bill by the hour for it that the State's got to pay for, and that's just what it is.

I know this actually came up a couple years ago during the -- when Steve Wolfson was appointed as the D.A. there was some discussion in the press in front of the County Commission about the number of death penalty cases. So more likely than not you're right that it's going to come back as more expensive. And as I said, in my personal opinion not as a judicial finding because I don't have any evidentiary basis for it, just from what I've seen and heard and read in the papers and I have friends in the legislature, they're seriously thinking about it, so that's why I say there's probably about a 50 percent chance that some time in the next, maybe not the next session, but maybe the next session after that, they may just say, okay, we're either going to get rid of it or narrow it to, like you said, just these, you know, narrow the mitigators, aggravators so that only -- so that we have fewer death penalty cases. They -- I would put that 50 percent maybe even higher than that. But again, I don't -- that's just from what I hear in the community and it's anecdotal. I don't know every legislator, I haven't polled them, it's just conversations.

So that may be where things are going. But the problem is, you know, I know what you're asking for, and as I said, I don't know that you're wrong. You may be absolutely right that in five years from now we're sitting here and there is no death penalty any more. But, you know, people ask me all the time, more often in civil cases than in criminal cases, to make policy rulings. And, you know, that's not really what I'm elected to do. I kind of listed -- there's the med mal statute out there which three of my colleagues have declared unconstitutional. That needs to be

rewritten or abolished. I don't know if you do med mal, but you probably know what statute I'm talking about. It's a ridiculous statute.

There's all kinds of statutes that I think are just -- just -- they're -- they need to be changed, they're probably going to be changed, but unfortunately, until they -- the legislature changes them, it's the law as it is and my oath is to apply the law as it is. And I can't just, you know, to you, this -- I don't want to -- I absolutely don't want to say this in a way that denigrates the importance of this case, this is a death penalty case, it's the most serious case there is, what I'm trying to say -- and so I'm not saying that the other examples are comparable to this. A med mal case is not a death penalty case. A foreclosure case is not a death penalty case.

My point is, there's a million laws that need to be changed. There's a million laws that probably are going to be changed. But until the legislature gets around to changing them, and that's one of the problems with biennial legislature, they only have so much time to changes things. So revising old laws is a very, very low priority every session. It's just the way it is. But I can't just sit here on all those cases and say, yeah, I think this is going to be changed so I'm not going to follow it any more. I'm not going to, you know, I can't sit here and say, I think this is going to be changed so I'm going to stay every single case. I mean, I'd love to, that would make my job a lot easier. But you can't just do that.

And I understand that death penalty cases are in a whole different class. We're talking about somebody's life and I'm not trying to demean that or denigrate that in any way. I absolutely am not. So I understand exactly what you're asking for. I understand, you know, why you're trying to do this, and you may be right. Maybe the legislature does what it does, and in a couple years the Supreme Court comes back and says, yeah, you need to -- and this whole five-week trial is a

complete waste of time and more taxpayer money. You may be absolutely right about that, I don't know.

But, you know, all I have here is I have a legal motion, I have to look at it on legal grounds. And as I indicated, you know, there's certain criteria that apply to a request for a stay. And, you know, unfortunately, although I do understand why you're asking for it, and as I said, you may be absolutely right, but one of the criteria in asking for a stay is not do I think the legislature's going to change the law, I mean, that's just not even a thing that's exists in even a single case I know of. You know, I get requests for preliminary injunctions, T.R.O.s, all the time, probably ten a week. And I, you know, I -- I -- there's a whole list of factors and, like I said, one of them is not do I think this law is going to be changed.

So I'm not sure I have legal grounds to even grant your stay even if, as a matter of sort of policy, I were inclined to do so. So, based on the law as it is today, I'm denying your motion for a stay. You know, it seems like it could be just -- could be open-ended. You know, the problem -- I know you're always asking for it for 2015, let's get past the merits of it, but in terms of the scope and duration there's a whole body of law on that. You're asking for 2015, but let's say in 2015 the legislature is -- gets this study and says, okay, this is good information, now let's seriously consider abolishing it, but we're going to do it in 2017, then you're going to be back here saying, well, let's extend it to 2017. That's what I mean why -- by saying that it seems like kind of what you're asking for is this kind of open-ended stay until the legislature does something which could be next year, it could be ten years from now. And that's not even, you know, that's actually, under the case law, a grounds to deny a stay if it's going to be an open-ended thing with a million continuances.

I mean, you've probably, if you do civil law, you know the cases I'm talking about as well as I do.

MR. SGRO: Right. And the only -- the only point on that, Your Honor, is that I believe that the policy then would be affected, we would essentially then put into play the very policy that we think exists because what would happen is if the State insisted on proceeding on certain cases as a capital prosecution, if a stay gets granted, what's going to happen is they're going to go have meetings, and you're going to find out which cases they actually really believe are the worst of the worst, and de facto, we're going to save a ton of money just because they're going to proceed on some cases as non-capital cases, they're going to go and revisit and they're going to ask themselves, do we really care if this particular defendant gets life without versus being on death row where that person may not ever be executed. And I understand that there may be some political reasons, some optics that may be in play that I have no idea what happens over there when they make those decisions.

THE COURT: Right.

MR. SGRO: But I will tell you, if -- if a stay is obtained, you're going to see these cases move forward any way. I would guess a lot of 'em are going to move forward just as non-capital litigation. This is -- that's my opinion.

THE COURT: Right. Well, I mean, you may be right, but the problem is that's a maybe. We -- we just don't know what the legislature's going to do in 2015, how far they're going to get in 2015. So in any event, I guess what I'm trying to do is I'm trying to make this decision very narrow. I know you're asking me to make a broad policy decision, but in my view that this is the wrong branch of government to go to, people ask me that all the time, and that's my standard response is, Look, if you

don't like something to talk to the legislature, except on a question of common law, you know, tort law, that's common law, I look to the law of other states, I can do what I think is fair, that's what common law is. But this isn't common law, this is a statute.

And my standard response to every lawyer, and you'd be shocked how many people want me to just rewrite laws because they think it's wrong, look, go talk to the legislature. And so, so I'm making this decision very narrow, which is just on the legal grounds for a stay, again, you may be right, maybe in 2015 we have more clarity, but you may be wrong is the problem, right? We are talking about, and I don't want to say this in a way that's cynical and denigrates a lot of people in the legislature, some of whom are my friends, but we're talking about politicians. They're not exactly known for being speedy, okay, we all know that, right? I mean, the -- the U.S. Congress, just as an example to get it out of Nevada and talking about the specific legislature, they've been talking about fixing social security since I was born and it's still not fixed, we're still facing, whatever, bankruptcy in 20 years.

And, you know, and -- I mean, you know what I'm talking about, there's -- there's -- there's things that they debate in Congress every year that they've been debating since -- since we were kids, and they still haven't fixed them. And I know the U.S. Congress is not the legislature. But the reality is you can't put -- make time predictions about the -- what the legislature may or may not do. And so as -- in the narrow legal grounds of your request for a stay, first of all, there's no real legal basis for it because you're asking for a stay on policy grounds. And secondly, as a matter of law, what you're asking for is a stay that may well be open-ended just kind of indefinite, and, again, you know, in the civil world there's a whole body of case law on stays, and that's actually a ground not to stay if the stay's going to be

an indefinite stay there's a bunch of cases that say you don't grant that stay because then that's just basically terminating the case.

So on narrow legal grounds getting away from whether you're right or wrong on policy grounds, and I've kind of expressed where, you know, I think you may be right, but that's not even within the realm of consideration, just on legal grounds, looking at the elements of what's required to stay a case like this, you haven't met them. And so your request for a stay is denied. But, you know, you're right -- you may be right, maybe we're back here in two years, we do this trial, we're back here in two years and I'm, you know, changing the whole penalty, we're doing another trial. But if that's what the legislature does, that's what they do. But I can't, you know, sit here and predict.

I don't, you know, I understand why you brought the motion, you know, as I hope you can tell, I gave it some pretty serious thought, I read the whole binder, it took me days, but -- because it's an important issue, but it's, you know, a lot of what you're asking for is not within -- you're in the wrong branch of government for it in my view. But, you know, if you want to appeal this and take it up to the Supreme Court and take a shot there, you're welcome to, that's totally up to you. I don't take anything like that personally.

But, so you mentioned a second ago, just to cover this, I don't know if you guys are ready to do anything about this, he mentioned some kind of discovery issue, is that something that you guys are working on? Or is that something you actually think may come up again quickly?

MS. BURKE: Your Honor --

MR. DiGIACOMO: I don't know if it's going to come up or not. When I went back to my office, Ms. Burke repeatedly sent e-mails saying, Look, we can't find

these -- these medical records, so I redropped the medical records for Devonia. I don't know how that could possibly continue the trial. She was shot in the stomach, it took a long time for her to get better. I redropped all those and made disks for all the defense attorneys in the case.

We also received, because Ms. Burke said in court, Hey, I don't know anything about my client being a gang member, we contacted the hard-core gang unit in San Bernardino saying, Hey, you have anything about Mr. Mason --

THE COURT: Because that did come up during the last -- there was some discussion about that.

MR. DiGIACOMO: Right.

THE COURT: Right, okay.

MR. DiGIACOMO: And I said we would contact them, we have contacted them about both Mr. Burns and Mr. Mason, we got a PDF with a couple of reports from the San Bernardino Police Department related to Mr. Mason and I e-mailed those immediately on over to Ms. Burke, but nothing related to any guilt phase issue that -- that I could think of. So, that's I think what Mr. Sgro's talking about unless there's some other discovery I don't know about, but --

THE COURT: Was that what you're talking about or was there something different? I mean, obviously, look, I don't --

MS. BURKE: And, Your Honor --

THE COURT: Sorry.

MS. BURKE: -- the medical records apparently were not sent to anyone before and there are 3,619 pages. And she was in the hospital for almost three months.

THE COURT: This is for which victim? The deceased or for one of the kids?

This is --

MS. BURKE: Pardon?

THE COURT: Whose --

MR. DiGIACOMO: The 12-year-old that was shot in the stomach. I mean, I --

THE COURT: The 12-year-old, okay. Gotcha. She -- she survived, right, as I -- I don't remember the name --

MR. DiGIACOMO: She survived, she's gonna testify.

THE COURT: Okay.

MR. DiGIACOMO: They're -- I can't imagine the fact that you -- other than page one that says she was shot in the stomach, what else is in those medical records that are -- that are relevant. I mean, I'd ask not to address that issue without a motion for them to continue in which they actually elicit --

THE COURT: No, I'm not addressing it because I'm not -- I don't have the motion. I was just curious.

MR. DiGIACOMO: -- what -- what prejudice could possibly be here.

THE COURT: Since you threw it out there, I was curious what you were talking about, but --

MR. SGRO: Here's what happened, Your Honor, we were in court -- we had a long day Tuesday because aside from this motion, there are many legal issues, and we ended up staying in court 'til past 5:00, we got there at 10:30. Somewhere during the course of the day, I don't even remember what time it was, frankly, Mr. DiGiacomo comes up to me and he says, Listen, I may have said something to the Court that wasn't accurate relative to these medical records, okay. And obviously we're focused on that case. So in passing he says I -- I don't -- I didn't produce them or words to that effect.

MR. DiGIACOMO: Well, actually, I didn't say that, what I said is I can't find electronically where the -- where the file is saved on my computer, so I don't know if I produced them or not, so I'm going to reproduce them to all of you.

THE COURT: Okay.

MR. SGRO: Right, so he says that to me and then he says, And also the file that Ms. Burke -- or the information relevant to the gang stuff that Ms. Burke had been seeking, I'm also sending over today.

THE COURT: Okay.

MR. SGRO: So, it was a comment, we were clearly on another case, he -- he says these things to me and then, you know, I haven't obviously -- I got ready for today's hearing. I haven't gone through the 3600 pages. But as you know, Your Honor, from doing the civil things, the medical records bear out a lot more than just the nature of the injury, there's going to be conversations about the event potentially in there.

THE COURT: Right.

MR. SGRO: Et cetera, et cetera, so it's --

THE COURT: I can see theoretically how it could be, you know, maybe chain of custody on the bullet. I don't -- I'm just throwing -- I don't know if that's an issue or not, but --

MR. SGRO: Well, I think a lot --

THE COURT: -- right, conceivably.

MR. SGRO: -- a lot's going to be born out in terms of her conversations with her health care provider which are exceptions to the hearsay rule, et cetera.

THE COURT: Right.

MR. SGRO: So this wouldn't be the first time we learned information relevant

to the case by examining medical records that had nothing to do with the treatment but had everything to do with statements. So it is somewhat overbroad to suggest all we have to look is page one to see that she was shot.

THE COURT: No, I understand. I'm not -- I'm not making a ruling. I was just curious --

MR. SGRO: Okay.

THE COURT: -- where this was going because I don't technically have a motion in front of me.

MR. SGRO: You don't --

THE COURT: But I just wanted to get a sense of what the issue was. But, okay.

MR. SGRO: I'd like the op --

THE COURT: I mean, I can -- no, I understand what you're saying, like, maybe she's maybe she said, Oh, it was some other dude who shot me, well, that's pretty important for you to know, right? But, okay.

MR. SGRO: We have an obligation to comb through the 4,000 pages.

THE COURT: Right.

MR. SGRO: And I will tell you, I haven't even begun because I've been getting ready -- we did the Herndon thing on Tuesday and then yesterday I tweaked the presentation a little bit. We haven't even started getting into the 4,000 pages. I'd ask the Court to give us enough time to at least flip through it to get an idea of what's in there and present a motion, if you'd give us a week or two to get something in front of you.

THE COURT: Yeah, that's fine. I mean, in the criminal world it only takes you about 48 hours to get something on calendar in here.

MR. SGRO: Okay.

THE COURT: So, you know, if you need to file a motion you can certainly, obviously you're welcome to file a motion so I can at least know what's going on.

MR. SGRO: And also to be completely transparent, Your Honor, I spoke to Mr. DiGiacomo about this as well, we've all dealt with writs before, sometimes a writ takes a day, sometimes a writ takes months and months.

THE COURT: Right.

MR. SGRO: So to be completely transparent I've also invited the State to consider whether or not they want to ramp up and get everybody ready because as soon as the argument is finished with -- in Judge Walsh's department and she has two of our defendants, so she'll hear it once, I don't know what I'm going to do for the second defendant to perfect that individual's record. But I doubt she's going to want to hear the same exact thing twice on something she's just heard. With that having been said, there is a plan to take the matter up and get some guidance from the Nevada Supreme Court just so we know whether or not we're moving forward. So, again, in the spirit of being transparent --

THE COURT: Right.

MR. SGRO: -- I want to put that out there. I can't -- I don't know if I can or I can't, but my intention was to conclude the arguments in the trial court level and then determine the best mechanism by which to consolidate the matters so that we don't have to file 'em in each of the different departments. So, with --

THE COURT: I don't -- well, that might be -- just from my knowledge of the Supreme Court rules, I don't know that you can file a consolidated writ or appeal off of three cases that aren't actually consolidated, but the Supreme Court can certainly consolidate them up there, they do that all the time when they have appeals on

different cases on the same legal issue.

MR. SGRO: And we're --

THE COURT: But I don't know that you can -- I don't know that you can do that here. I can't consolidate my case, for example, with Doug Herndon's case when they're not factually --

MR. SGRO: No, just on the issue.

THE COURT: Right.

MR. SGRO: Just on the issue. And I understand, these are --

THE COURT: There's a way to do that, but I think it's done up at the Supreme Court, it's not done here, yeah.

MR. SGRO: And that may well be, the point of the matter is, I want to make sure everyone knows that we're currently planning to take this up on a writ, but I can't do it today. My thought was to conclude the arguments at the trial court level, there's not going to be a timeliness issue because we'll be within the sufficient time. But it will hit days before our currently schedule trial date. It's just the mechanics of the timing of how these things have all been laid out in terms of getting 'em on calendar, getting people here, parties have conflicts, et cetera. So --

THE COURT: Okay. Well, I mean, you, you know, obviously you're welcome to do whatever you want to do, that's your, you know, you do your job as an attorney --

MR. SGRO: Just for scheduling purposes.

THE COURT: Right.

MR. SGRO: I don't want any surprises.

THE COURT: Right. And -- right. And obviously, you know, I -- the Supreme Court's going to do what they're going to do, I don't know if they're going to issue a

stay or not, that's up to them. But just to be, not to be nit-picky, strictly speaking, you couldn't do a writ today anyway because there's no order entered. You can't do it until the order's been entered, which probably will take a couple days anyway. But -- but I appreciate your letting me know that that's a possibility, and if the Supreme Court jumps in and says, okay, freeze this trial, then they do that, they do that every now and then, I, you know, have no control over that. So, but I appreciate your giving me the head's up.

MS. BURKE: And --

MR. SGRO: And I would, just for purposes of the record, ask for a stay today pending the filing of the writ.

THE COURT: Well, strictly speaking, I have to deny that because you haven't even shown me what the writ is. You're supposed to at least make some presentation to me of what the grounds are and dah, dah, dah. So strictly speak -- so what I'm going to do on your verbal request is deny it without prejudice until you actually file the proper paperwork requesting a stay, all right?

MR. SGRO: Fair enough, Your Honor. Thank you.

MS. BURKE: And, Your Honor, the -- the 16th is Monday, I think.

THE COURT: Yes, it is.

MS. BURKE: Which is the 21st day, now on the -- the hearing on the 28th of July there was a bunch of language about 14 days --

THE COURT: Well, it couldn't be, the 28th of July was a Sunday. But I don't -- which hearing are you talking about?

MS. BURKE: Okay.

THE COURT: Are you talking about the discovery motion?

MS. BURKE: Well, the 21st day before trial is the 16th.

THE COURT: Okay.

MS. BURKE: And that's ordinarily when everything would have to, I mean, the expert info and everything else, I read when I was reading through the transcript from July, I read that they were talking about 14 days. I don't -- I just wanted to get that clear as to whether -- what -- what the situation was --

THE COURT: For what? What are you talking about, 14 days for what? What were you talking about?

MS. BURKE: To get expert information in and other stuff that would ordinarily be timed by the 21-day.

MR. DiGIACOMO: I don't recall that conversation, Your Honor, at all. I mean, I assume the statute applies.

THE COURT: No, I do. Actually, during the motion, hang on, because during that whole argument there were a couple of deadlines that I adjusted based upon some discussion, that I do specifically remember. I just -- I don't have the order in front of me, so I don't remember what I did. I do remember giving somebody more time on something and somebody a couple days less time because there was some specific reason. Do you remember this? There was a specific discussion about can we do this on such-and-such day instead, and I said, yeah, and so there was one date that I did change, but I don't -- I just don't remember what it is.

MS. BURKE: It came up about --

THE COURT: Because I, you know, I didn't have time to look at it.

MS. BURKE: -- it came up about three times, I think it was -- and it was 14 days every time. And obviously, with this whole -- I do intend to file a motion to continue. I hope I will try to get it in tomorrow and -- and see what's up. But, for example, this girl was in the hospital for almost three months and most of that was

due to the fact that she got an infection. Now, whether that infection was due to the actions of whoever shot her or somebody at the hospital goes to -- to things as well. So I mean, these records are --

THE COURT: Goes to what? To substantial bodily harm? I'm -- goes to what?

MS. BURKE: Well, it goes -- goes to what the jury might think.

THE COURT: Okay, well. I'm not sure you're asking me to do anything, but I, now that you mention it, I do remember, maybe you should go back and look, there was a -- there was at least one deadline that I do specifically remember after that discussion, I did change a deadline to -- I don't remember why, I just remember it happening. You might want to look at the order.

MR. DiGIACOMO: The only thing I can think of is that there was a big argument over reciprocal discovery, and I believe instead of 21 days it may be the 14 days we're talking about is the defense has to provide us the underlying data of their expert including their mitigation experts 14 days before trial.

THE COURT: Yeah, I think it was something like that. I just don't remember.

MR. DiGIACOMO: As it relates to the guilt phase, I don't believe you changed anything, but as it related to the penalty phase, I think you gave them an extra week but the -- at that point there -- they had to provide us the information that they normally object to providing us, that was the one date I recall being changed.

THE COURT: Do you recall, Mr. Sgro? I recall doing it, I just don't remember what it was that I did.

MR. SGRO: You know what, Your Honor, I -- I don't. And here's -- here's -- the thing is we have many cases in common. And so I can't remember --

THE COURT: Yeah.

MR. SGRO: -- if we've yet fought about the -- because the mitigation issue is something near and dear to me.

THE COURT: Right.

MR. SGRO: As Mr. DiGiacomo well knows, and so we've had this fight numerous times, and I frankly can't remember if we did it here. So I'd like to check --

THE COURT: I did. There was -- there was a deadline that I think I gave you more time on, and I think I gave them more time on one. It was like two different things. Now that I'm -- it's sort of slowly back to me, there's no -- to make it more - there was some discussion, you guys didn't have any objection to that, so there were some manipulation of the deadlines. I just don't remember what it is. But in any event, I mean, right now there's no actual motion, you're just sort of -- I gather you're just sort of telling me that there may be a motion coming, right?

MS. BURKE: Well, yes, but the other problem is with the deadline being Monday currently and we've only got one day before Monday, I -- I will get the motion done and filed like tomorrow, but I don't know what to do about Monday because I -- I just don't think it's right to file anything when we've got these kinds of issues going on.

MR. DiGIACOMO: In other words, she wants you to change your previous order. I'd request that your previous order stand, Judge.

THE COURT: I don't even, you know, the problem is because it's just happening verbally, I don't even remember what the specific dates of my previous order were, I'd have to go back and look at 'em. So I'm not sure what we're even, I'd just have to go back and check.

Well, I mean, the best I can tell you is as things stand now because,

you know, if someone had mentioned this, I could have gone back and pulled out the previous order, but I don't have it with me. So what is it you want? You want more time to file your motion? Is that what you're asking for?

MS. BURKE: No, I will get the motion filed right away. I -- I just want to hold off on stuff that's due 21 days ahead of time because I think there's good basis for the motion to continue for one thing. And I just don't want to give up stuff that I don't think should be given up yet.

THE COURT: Okay. Well, I mean, I don't have a, you know, it's just a verbal motion and as I said, I wish I had a chance to look at it, but, I mean, as of right now, I'm denying your request without prejudice. All the deadlines stand. But, I mean, I don't know what motion -- your basis for your motion is going to be. I don't even remember what's due on Monday honestly, because I know I did change some of the dates, so I can't --

MR. DiGIACOMO: Twenty-one days would the normal expert for the State. The State's filed.

THE COURT: Okay.

MR. DiGIACOMO: But I don't --

THE COURT: But what do they have to do in 21 days? I don't remember.

MR. DiGIACOMO: I think you made it --

MS. WECKERLY: They have the same expert --

MR. DiGIACOMO: -- I think it was their expert, but I can't remember if you changed the date of their expert or not.

THE COURT: I -- okay.

MR. DiGIACOMO: And it may be that it went to 14 days instead of 21.

THE COURT: Do you remember? I don't.

MR. SGRO: I just want time to flip through it just because I just don't have any recollection on that in this particular case.

MS. BURKE: And I couldn't tell from reviewing the record exactly what it was.

THE COURT: Okay. Well, and the problem is nobody seems to really remember. I know this happened months ago. But so what I'll do is I'm denying your request without prejudice. Let me take a look at it, if you want to file something, you know, and if they want to file something and have me to reconsider those deadlines, I can look at it, but I'm really not prepared to do anything about it right now. Okay?

MR. DiGIACOMO: Thank you, Your Honor.

MR. SGRO: Thank you, Your Honor.

THE COURT: All right, thanks, guys.

MR. ORAM: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 12:14 P.M.

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber