

HOUSE JOINT RESOLUTION H

April 15, 1999, Introduced by Reps. Julian, Gilbert, Howell, Bishop, Green, Tabor, Gosselin, Voorhees, Kukuk, Toy, Koetje, Law, Bradstreet, Mortimer, Garcia, DeRossett, Rocca, Pappageorge, Kuipers and Cassis and referred to the Committee on Constitutional Law and Ethics.

A joint resolution proposing an amendment to the state constitution of 1963, by amending section 46 of article IV, to provide for the death penalty in certain circumstances.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to provide for the death penalty in certain circumstances, is proposed, agreed to, and submitted to the people of the state:

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ARTICLE IV

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Sec. 46. No law shall be enacted providing for the penalty

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of death EXCEPT FOR FIRST DEGREE MURDER. THE LEGISLATURE SHALL

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PROVIDE BY LAW FOR THE IMPLEMENTATION OF THIS SECTION.

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Resolved further, That the foregoing amendment shall be

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submitted to the people of the state at the next general election

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in the manner provided by law.

DEATH PENALTY FOR FIRST DEGREE MURDER

House Joint Resolution H as introduced First Analysis (4-21-99)

Sponsor: Rep. Larry Julian
Committee: Constitutional Law and Ethics

THE APPARENT PROBLEM:

According to a 1978 *Michigan History* article, in 1846, the Michigan legislature abolished capital punishment for murder as part of an overall revision of all of the state laws, including its lengthy criminal code. Michigan thus became the first English-speaking jurisdiction in the world to statutorily abolish the death penalty. Despite a number of attempts to reinstate the death penalty over the years, the statutory prohibition against the death penalty was not overturned legislatively and subsequently was written into the 1963 state constitution.

Various attempts have been made over the years to reinstate capital punishment in Michigan. Although there were four legislative attempts (all four bills died either in committee or on the floor) between the years 1900 and 1926 to undo the prohibition on the death penalty, the subject wasn't even mentioned at the state's constitutional convention of 1908. However, with the rise in bootlegging crime in the prohibition era, the Michigan legislature passed a death penalty bill which was vetoed by the governor in 1929. In 1929, the bill again was passed, with a referendum provision, which was defeated by a vote of 352,000 to 269,000. Frank Murphy and Henry Ford were among the notable state citizens against it. In the early 1950s, Michigan prison riots resulted in another effort to bring the death penalty back, so that by 1956, the Michigan House or Senate had voted for capital punishment eight times in the 20th century and one referendum had been defeated.

At the state's latest constitutional convention, which opened in October, 1961, and which produced the state constitution of 1963, its youngest Republican delegate, a young lawyer named Eugene W. Wanger, wrote the proposal, adopted by the convention with only three dissenting votes, that resulted in the current state constitutional ban on the death penalty. Article IV, Section 46, of the state constitution says that "No law shall be enacted providing for the penalty of

death." The 1963 state constitution took effect on the first day of 1964.

Eight years later, in 1972, the United States Supreme Court, in a 5-4 decision, [*Furman v. Georgia* 92 S Ct 2726 (1972)], held that capital punishment in the United States was unconstitutional on the grounds of being cruel and unusual punishment because of the randomness of sentencing in death penalty cases. The court's 1972 decision found that all existing state death penalty laws violated the constitution because the laws gave judges and juries too much discretion in deciding which defendants should live and which should die. The *Furman* decision automatically made capital punishment laws in the United States unconstitutional and all 629 death row inmates at the time received new sentences of life in prison. However, in a series of five rulings in July 1976 the United States Supreme Court provided states with basic guidelines for framing constitutional death penalty laws. Generally, the consensus of the decisions was that death penalty statutes would be constitutional under certain conditions of guided discretion and review that would prevent the death penalty from being arbitrary or capricious. The standards established in these decisions, briefly, are that a death penalty law would be constitutional if (1) guilt and punishment were decided separately, (2) aggravating and mitigating factors were statutorily mandated and considered, and (3) there was appellate review of the process. Subsequent United States Supreme Court decisions have further elaborated on these standards, notably in 1989 (in *Penry v. Lynaugh*, 109 S Ct 2934) that, in general, executing mentally retarded people convicted of capital offenses would not be categorically prohibited under the Eighth Amendment and (in *Stanford v. Kentucky*, 109 S Ct 2969) that, in general, the imposition of the death penalty on someone for a crime committed while 16 or 17 years old also would not categorically constitute cruel or unusual punishment under the Eighth Amendment.

As of December 1998, 38 states have instituted the death penalty under the U.S. Supreme Court guidelines. Twelve states, including Michigan, have not, although several unsuccessful attempts to reinstate the death penalty, either in the form of joint resolutions proposing to amend the state constitution or petition drives to put the question of the death penalty up for a vote of the people, have been introduced in 1973, 1976, 1977, and 1978. Beginning with the 1985-1986 legislative session, joint resolutions to reinstate the death penalty have been introduced in every legislative session since then (with the exception of the 1991-1992 session). In the current, 1999-2000, legislative session, two Senate joint resolutions to institute the death penalty for first degree murder (SJR C and SJR F) and one Senate joint resolution to institute the death penalty for certain cases of first degree murder (SJR K) have been introduced. In the House, House Joint Resolution H was reported out of the House Committee on Constitutional Law and Ethics on April 20, 1999.

THE CONTENT OF THE RESOLUTION:

The joint resolution would amend Article IV, Section 46 of the state constitution to allow the death penalty for first degree murder, and would submit the proposal to a vote of the people at the next general election.

BACKGROUND INFORMATION:

First degree murder. Under the Michigan Penal Code (MCL 750.316), there are three kinds of first degree murder in Michigan: premeditated murder ("murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing"), felony murder (murder "committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnaping"), and the murder of a peace officer (including a corrections officer) committed while the peace officer is lawfully engaged in the performance of his or her duties.

According to the House Fiscal Agency (4-21-99), of the 10,580 offenders received into Michigan's prisons and camps, 114 were convicted of first-degree murder.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, although figures vary, a number of studies and reports have suggested that the costs of capital punishment are substantially higher than the costs of imprisoning an offender for life without parole. Costs associated with pursuing a penalty of death for an offender are largely those associated with due process of law and include higher costs of investigation, indictment, pretrial proceedings, trial, appeals, and post-conviction petitions, as well as death-row incarceration and execution. Available studies, however, predate recent Congressional enactment of habeas corpus reforms aimed at limiting appeals in death penalty cases, and it is not yet clear to what extent the recent reforms may reduce overall costs of capital punishment. (4-21-99)

ARGUMENTS:

For:

Proponents of the resolution offer the following reasons for supporting the reinstatement of the death penalty:

** Some crimes are so terrible that people who commit these crimes must be executed if justice is to be done. This position is a version of the view that justice, or an important component of justice, is fundamentally retributive. That is, the appropriate (and, some would say, proportionate) punishment for crimes is the price that criminals must pay, regardless of other possible effects of the punishment such as deterrence. In the case of first degree murder, the death of the murderer is the appropriate punishment for the crime committed.

** The death penalty might deter some people from committing first degree murder. And even if this cannot be proved, it is certain that a murderer who is legally executed will not murder again.

** The death penalty might save the state (which is to say, the taxpayers) money, since incarceration for life at maximum security levels is so expensive. For example, according to one source using 1994 federal Justice Department figures, the costs for life without parole in death-penalty equivalent cases, could come to \$3.07 million (\$34,200 a year for 50 years at a two percent annual cost increase plus \$75,000 for trial and

appeal), while costs for the death penalty could be as low as \$1.98 million (at \$60,000 a years for six years at a two percent annual cost increase plus \$1.5 million for trial and appeal). If a figure of 8 years on death row is added, the death penalty case costs would rise to \$2.5 million at a two percent annual increase, still nearly \$1 million less than life without parole cases.

** Although the United States is a secular democracy with a separation of church and state, some proponents also argue on Biblical grounds that the Judaeo-Christian tradition supports the case for the death of murderers.

** Supporters of the resolution argue that it is only right and fair that the legislature allow the people of the state to decide this important issue. While polls can be cited that support both sides, the only way to truly find out what the voters of the state want is to submit it to them to vote on.

Against:

Opponents of the death penalty offer a number of reasons for their opposition to the resolution that would allow capital punishment for first degree murder.

** Michigan already has the appropriate punishment for the most terrible of crimes, namely, life imprisonment without parole. As virtually everyone is aware, life in prison is neither easy nor comfortable, even apart from the fact that incarcerated people are shut away from their families and any other loved ones.

** Mistakes are sometimes made and there are known cases of innocent people having been executed. The execution of even one innocent person is fundamentally wrong and a terrible injustice not only to the executed person but to his or her family and loved ones. And unlike life imprisonment, death by execution is irreversible. Although no one knows how many innocent people are imprisoned and sentenced to death, the Monday, April 21, *New York Times* featured a story relating how DNA tests are freeing scores of prison inmates, with the most recent being two men in Oklahoma, one of whom was sentenced to life imprisonment, the other of whom was under a death sentence. The two men are the 61st and 62nd to be exonerated by DNA evidence, and the man under

a death sentence was the 78th person in the country since 1970 to be cleared after being put on death row. The inevitability of executing innocent people is too high a price to pay for the satisfaction some people might feel over the execution of criminals.

** All democracies and most all civilized countries in the world have abolished the death penalty, and Michigan has been the leader in the English-speaking world in its abolition of capital punishment in 1846. Reinstating capital punishment would constitute a significant social, moral and political step backwards for the state.

** Capital punishment has never been shown convincingly, much less conclusively, to deter people from committing terrible crimes. Most murders are committed with little forethought, and it is almost axiomatic that people committing crimes do not expect to be caught, much less punished. And in those cases where a murder is planned ahead of time, it is unlikely that the perpetrator expects to be caught either, and therefore is unlikely to be deterred by the thought that, if caught, he or she could be executed.

** Where the death penalty is allowed, it is carried out disproportionately on the poor, the uneducated, and minorities. The 1972 U.S. Supreme Court case that originally ruled against the constitutionality of the states' death penalty laws was based on the arbitrariness of their application, and many people are convinced that when the death penalty is an option, a form of particularly virulent discrimination against the poor, the uneducated, and minorities is inevitable. Some people further fear that the current racial and economic divisions in our society will only be exacerbated if the death penalty is reinstated.

** Many people are troubled by the fact that the resolution would allow the execution of juveniles and the mentally impaired.

** Many people argue, also on religious grounds, that killing is morally wrong, whether done by individuals or by the state. In fact, some people argue that killing by the state is especially pernicious, since state executions perpetrate and legitimize violence instead of ameliorating it. What is more, state-sanctioned executions involve all of the state's citizens, regardless of their sincerely held religious and moral beliefs.

Capital punishment basically is a form of vengeance, and the state should act in such a way as to ensure that justice is not confused with revenge.

POSITIONS:

A number of individuals, including members of families of murder victims, testified in support of the resolution. (4-20-99 and 4-21-99)

The Shiawassee County prosecuting attorney indicated support for the resolution. (4-19-99)

A number of individual from families of murder victims testified in opposition to the resolution. (4-19-99 and 4-20-99)

Representatives from the following groups indicated their opposition to the resolution:

- ** The Michigan Committee Against Capital Punishment
- ** Murder Victims Families for Reconciliation
- ** The Michigan Catholic Conference
- ** Ground Work for a Just World
- ** The Michigan Chapter of the American Civil Liberties Union

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.