The Miami Herald

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Capital punishment in paralysis

Huge caseload bloats lethargic, costly system in Florida, U.S.

By DAVE VON DREHLE
Herald Staff Writer

On a whim during a burglary, Charles Proffitt murdered Joel Medgebow on July 10, 1973. He plunged a bread knife into his sleeping victim's chest, "just to see what it felt like."

Three years later, using *Proffitt vs. Florida* as its test case, the U.S. Supreme Court upheld Florida's death penalty. Proffitt could be dead in six months, Attorney General Robert Shevin predicted.

Today, 15 years after the murder, Charles Proffitt is alive and well, sewing uniforms for inmates at Florida State Prison. The Florida Supreme Court reduced his sentence to life last year.

The state of Florida spent at least half a million dollars over a decade and a half trying to execute Charles Proffitt. It failed.

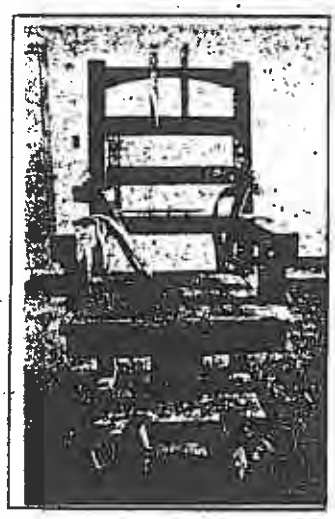
THE DEATH PENALTY
A FAILURE OF EXECUTION
First of a series

For Florida, and the 36 other states that impose the death penalty, *Proffitt vs. Florida* is still a test case. And the death penalty fails the test. The death penalty is costly, slow and inefficient.

Apart from any arguments about the morality of capital punishment, there is something terribly wrong with the system.

● **Costly:** The death penalty costs much more than life imprisonment without parole. It has cost Florida at least $57 million since 1973, according to conservative calculations based on independent studies.

A WHOPPING BILL



▶ Spent by Florida taxpayers on the death penalty since 1973: at least $57,215,210.

▶ Executions: 18.

▶ Cost per execution: at least $3,178,623.

▶ Cost of life in prison (40 years): $515,964.

▶ The appeal process: at least $36.1 million, just for government-paid lawyers.

● **Slow:** 36 inmates on Florida's Death Row have been there more than 10 years. Florida's senior Death Row resident, Howard Douglas, is in his 15th year — and his execution is nowhere in sight.

● **Inefficient:** Half of all death sentences are overturned on appeal, usually after years of expensive litigation. For every execution in America, courts sentence 13 more people to die.

The statistics speak for themselves: Death Row is going to get bigger, the wait for execution is sure to get longer, and the cost is bound to get higher. Experts are coming to the grim conclusion that little or nothing can be done to make the system work. It is a failure of execution.

Nowhere is this fact more clear than in Florida, a

Turn to DEATH ROW / *12A*

Bloated system appears doomed

It's lethargic, it's expensive, it's failing

DEATH ROW / *from 1A*

fervently pro-execution state that has always been among the first to arrive at death penalty milestones.

Here — where 296 convicted killers make up the largest Death Row in the nation — judges, prosecutors and politicians are quietly lowering their sights, giving up on swift and sure justice, and learning to live with a bloated system that splutters and wheezes.

"I don't know if we're ever going to catch up," says Carolyn Snurkowski, Florida's chief appellate prosecutor. The best the system can hope for, she says, is to "keep plodding along."

For capital punishment advocates, this is a bitter pill. Just two years ago, former Florida Attorney General Jim Smith pumped up his campaign for governor by promising two executions a month or more. "This delay couldn't go on forever," he said.

Today, the numbers refute such predictions. Even though the public solidly supports the death penalty, Florida has executed but two men in the past two years. Nationwide, the number is just 39.

In the same two years, Florida courts sent 89 people to Death Row. Nationwide: some 600.

"We're not going to clear out Death Row any more than we're going to pay off the national debt," says former Florida Bar Association President James Rinaman of Jacksonville. Rinaman, a death penalty advocate, has labored for more than three years to speed up the system.

Failure clearly visible

The failure of the death penalty is visible from one end of the nation to the other.

- More than 2,100 people live on America's Death Rows. At the current execution rate, it would take 82 years to kill them all. And the Death Row population is likely to double by the turn of the century.
- In Dade County, the public defender is under court order not to take on any more death penalty cases — the caseload is too great. Private attorneys must be appointed — and paid for — by the courts. "The system doesn't have the resources to handle the workload," says Public Defender Bennett Brummer.
- The number of capital cases on appeal in the federal courts will more than triple in the next two years, according to a study prepared for the federal judiciary. Lawyers to handle these appeals will cost the nation's taxpayers $30 million a year, the study concluded.

California, for example, has 234 prisoners on Death Row — the third-largest population in the country. Its last execution was in 1967. Yet the taxpayer-funded budget for defense attorneys there is more than $2 million a year.

- Even Bob Graham, the former Florida governor who signed more death warrants than anyone in the state's history, pronounces the death penalty system a "quagmire."

Proffitt

Bundy

'If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short.'

Sen. Bob Graham

"And if the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short," Graham says.

It was not supposed to be this way. Not after millions of dollars and years of effort spent trying to make the death penalty work.

The heyday

The heyday of the death penalty in America came in the 1930s. Hanging judges and biased juries too often used the penalty as little more than a legal lynching.

Gradually, the numbers subsided: there were fewer executions in the '40s and fewer still in the '50s. Legal assaults on the fairness of the death penalty system stopped executions altogether in Florida in 1964. In 1965, a commission to revise New York's penal code found that "whatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste."

Two years later, executions ceased across the country.

In 1972, a narrow and fractured majority of the U.S. Supreme Court concluded the death penalty, as it existed in America, was unconstitutional.

Justice William Brennan wrote that capital punishment depends on "a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future."

Although Brennan and Justice Thurgood Marshall said the death penalty would always be unconstitutional, the seven other justices encouraged the states to draft new laws that would meet the constitutional test.

'A back-breaker'

Florida obliged within six months. Texas, Georgia, Louisiana and others were close behind. Courts and legislatures in 37 states have tinkered ceaselessly ever since, trying to make the death penalty fair, rational and swift.

But instead of fair, rational and swift, all this tinkering is making the law ever more complicated. And complicated means slow. It means expensive.

"There is no question that it's a back-breaker," says Sandy Weinberg, a former federal prosecutor. Recently, Weinberg helped win freedom for Death Row inmates William Riley Jent and Earnest Lee Miller. "It takes eight years or more of litigation to execute someone, and the process just can't go faster."

"The Supreme Court has said 'death is different,' " says Bob Spangenberg, a Boston-based consultant

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This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out $1.2 million in attorney time and $173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about $3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out $12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top $30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell nearer the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is $13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough execute him costs, on averag $108,000.

Total it up.

Florida taxpayers have paid mo than $57 million for the death pen ty since 1973. This number is bas on the most conservative figur available. The real cost could eas be twice that or more.

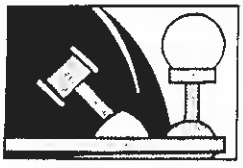
Divide the $57 million by 18 ex cutions. The bottom line: at le $3.2 million per execution. And t cost is growing.

Bob Spangenberg, the bar asso ation consultant: "The costs are ing to add and add and add and ac It's going to add up until somethi gives."

Michael Gradess, who studied t issue for the state of New Yo "You're going to see a death pena that costs a billion dollars natic wide."

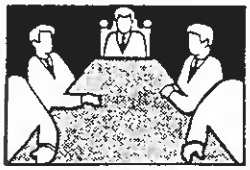
THE PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.



TRIAL & SENTENCING: $36,000-$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.



MANDATORY STATE REVIEW: $69,480-$160,000

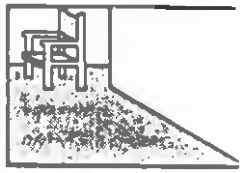
Every death sentence must be reviewed by the state Supreme Court — not required in nondeath cases.

ADDITIONAL APPEALS: $274,820-+ $1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.

JAIL COSTS: $37,600-$312,600

Death Row requires extra guards for high security.



EXECUTION COSTS: $845

Florida pays $150 for the executioner, $150 for a death suit, $20 for the last meal and $525 for burial.

SOURCES. Miami Herald research; Florida Department of Corrections; Florida attorney general; Florida Office of Capital Collateral Representative; American Bar Association Post-Conviction Death Penalty Representation Project; Criminal Justice Act Division, Administrative Office of the U.S. Courts; Committee to Study the Death Penalty in Maryland; Kansas Legislative Research Department; Alaska Department of Corrections; *Capital Losses*, a report to the New York Assembly Ways and Means Committee; *The Cost of the Death Penalty*, in the University of California-Davis Law Review.

ABOUT THIS SERIES

TODAY
The death penalty costs a lot and delivers little. And it's getting worse.

MONDAY
After the death sentence: Why does the appeals process take so long?

TUESDAY
The death penalty is good for politicians, but politicians are bad for the death penalty.

WEDNESDAY
What can be done? A look at proposals to fix the death penalty, and a tough alternative.

The Miami Herald

1 2 3 4 5 6 7 8 9 10 MONDAY, JULY 11, 1988 F-2 * Contents Copyright© 1988 The Miami H

Fairness was fatal blow to fast executions

THE LONG ROAD TO EXECUTION

These are the steps every capital case must pass through before execution:

THE DEATH PENALTY
A FAILURE OF EXECUTION
Second of a series

- ▶ **TRIAL** — Defendant guilty or not guilty?
- ▶ **SENTENCING** — Should defendant live or die?
- ▶ **DIRECT APPEAL** — State Supreme Court reviews decision.
- ▶ **U.S. SUPREME COURT** — Process fair thus far?
- ▶ **COLLATERAL APPEAL** — State courts examine trial procedures.
- ▶ **HABEAS CORPUS** — Federal courts look for constitutional violations.
- ▶ **U.S. SUPREME COURT** — Final review.

At any point, the case can be sent back to a lower level. And the process begins again.

By DAVE VON DREHLE
Herald Staff Writer

Howard Douglas is the Methuselah of Death Row. The jury thought he should live, and the judge thought he should die. Fifteen years later, courts are still trying to sort it out.

Douglas may well become the first man in Florida history to live for 20 years in the shadow of the electric chair.

But almost certainly, he won't be the last.

Why does the death penalty take so long? Why is it that 97 percent of the death sentences imposed by America's courts have yet to be carried out — even though the public strongly supports capital punishment and spends millions trying to speed the process?

Lawyers blame the governors. Governors blame the courts. Courts blame the lawyers. But still nothing happens. There is a population explosion on America's Death Row, and no one has a realistic solution.

Legal experts — both for and against capital punishment — are coming to an identical conclusion: The death penalty itself is to blame. It is too complicated to work efficiently.

When the death penalty almost died 16 years ago, advocates rushed to resuscitate it. What they ended up with, many experts now believe, is a monster of litigation — unpredictable, irrational, causing chaos wherever it goes. And impossible to control.

Here's why it is failing:

● When the U.S. Supreme Court decided in 1972 that capital punishment was unconstitutionally arbitrary, state legislatures moved swiftly to restore the death penalty. To eliminate the problem of unfairness, lawmakers established complex standards for determining who should live and who should die.

● The Supreme Court wanted to make sure the new laws worked — that they really were fair. So it initiated an unprecedented level of state and federal court scrutiny.

● Courts eventually discovered that the complicated new laws worked only

Turn to DEATH / 8A

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who has studied legal costs and the death penalty for 24 state and federal agencies. "The court has said everyone must follow extensive procedures to guarantee the process is fair. And that takes a lot of time. In *every* case."

As judges anguish over each case, more and more pile up behind. The backlog is infinite. With 300 new cases every year, the U.S. could execute one person every day, and it would take more than 30 years to empty all the Death Row cells.

No one familiar with the system believes that is possible. Daily executions are unprecedented in American history. The executioner's busiest year was 1935, when there were 199 executions.

That record rate, given the current pace of death sentencing, wouldn't make a dent in America's Death Row. At that rate, Death Row would keep on growing.

Last year there were 25 executions in America, the most in a quarter century. Yet the system is barely plodding along, falling further and further behind.

Even that great motivator of balky government — community outrage and pressure — cannot speed the system. No murderer is more loathed and notorious than The dore Robert Bundy. In 1978, Bun slipped into a Tallahassee soror house and bludgeoned two sleepi women to death, then killed a 1 year-old girl in Lake City.

He was sentenced to die thr times in 1979. Nine years lat Bundy is alive and well on Dea

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FLORIDA'S DEATH ROW INMATES

At Starke, more inmates — 298 — await the executioner than in any state. Eighteen have been electrocuted.

14 YEARS ON DEATH ROW: Howard Douglas, Gary Alvord, James McCray, Vernon Cooper.

13 YEARS: Ronald Jackson, Jacob Dougan, Alvin Ford, Levis Aldrich, Charles Messer, Douglas Meeks, William Elledge, Thomas Knight, Lenson Hargrave.

12 YEARS: Carl Jackson, Sampson Armstrong, Charles Foster, Raymond Stone, Elijaah Jacobs, Wardell Riley, Jesse Tafero, Mark Mikenas, William Zeigler, Joseph Spaziano.

11 YEARS: Henry Sireci Jr., Harold Lucas, James Hitchcock.

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10 YEARS: James Rose, Amos King, Carl Songer, Ernest Downs, Bennie Demps, Robert Buford, Freddie Hall, Mack Ruffin, Morgan Floyd, James Morgan.

9 YEARS: John Ferguson, Walter Steinhorst, William Thompson, Jimmy Smith, Stephen Booker, Nollie Martin, William Christopher, Raleigh Porter, William White, Marvin Johnson, Aubrey Adams Jr., Leslie Jones, David Delap, McArthur Breedlove, Robert Henry, Kenneth Griffin, Gary Trawick, Roy Stewart, Terry Sims, Theodore Bundy.

8 YEARS: Gregory Engle, Rufus Stevens, Johnny Copeland, Bryan Jennings.

7 YEARS: Frank Smith, Paul Scott, Larry Johnson, Theodore Bassett, Bobby Lusk, Gregory Mills, Bernard Bolander, Robert Combs, Robert Waterhouse, William Middleton, Terrell Johnson, Robert Teffeteller, Kenneth Quince, James Agan, Dan Poulty, Ernest Fitzpatrick, Sonny Dale Jr., Larry Mand, Oscar Mason, Jeffery Daugherty, Linroy Bolloson, Ian Lightbourn, John Michael, John O'Callaghan, Chester Maxwell, Jim Chandler.

6 YEARS: Manuel Valle, Ed Thomas, Theodore Harris, Robert Preston, Leo Jones, Freddie Williams, Edward Kennedy, Norman Parker Jr., James Card Sr., Phillip Atkins, Ted Herring, William Squires, Daniel Johnston, Robert Patton, Thomas Rose, Roy Harich, Jerry White, Robert Craig, Omar Blanco, Charlie Burr, Ronnie Jones, Davidson James, Milford Byrd, Daniel Doyle, Frank Griffin, Mario Lara, David Gorham, Larry Brown, Robert Henderson, John Rush, Douglas Jackson.

5 YEARS: Alphonso Cave, John Mills, J.B. Parker, Garry Hoffman, Tommy Groover, Kenneth Hardwick, Allen Davis, George Lemon, Kayle Sales, Ernest Roman, F.L. Medina, Lloyd Guest, Robert Parker, Clarence Hill, Marion Francis, Milo Rose, William Ruiz, Raymond Koon, Clarence Jackson.

4 YEARS: Harold Hooper, Joel Wright, Ronald Woods, Enrique Garcia, Raymond Ostinsky, Gerald Stano, Fred Way, Andrea Jackson, Harry Phillips, Robert Reese, Richard Cooper, Jason Mallon, Michael Lambrix, Ernesto Suarez, William Kelley, Anthony DeViolotti, Robert Glock, Carl Dulatti, David Johnston, Jason Deaton, Donald Lloyd, James Huff, John Marek, Jeffrey Muehleman, Thomas Provenzano, Eduardo Lopez.

3 YEARS: Charles Knight, James Floyd, James Hamblen, Joan Malendez, Gregory Kokal, Oscar Torres-Abroledo, Jerry Rogers, Abron Scott, Nathaniel Jackson, David Gore, Joseph Ramirez, Herbert Spivey, Burley Gilliam, Billy Nibert, Robert Long, Joe Nixon, James Floyd.

2 YEARS: Richard Rhodes, Layne Tompkins, Guy Cochran, Jessie Livingston, William Turner, Roy Swafford, David Cook, Judias Buendano, Martin Grossman, Rickey Roberts, Angel Diaz, Johnny Perry, Jerry Correll, Duane Owen, Gary Tillman, Morris Brown, John Hardwick Jr., Frank Smith, Anthony Bryan, Johnny Williamson, Daniel Remeta, Reinaldo Amoros, Donald Kritzman, Johnny Robinson, Harold Harvey Jr., Hector Fuente, Juan Banda, Jesus Scull.

LESS THAN 2 YEARS: Etheria Jackson, John Merritt, Paul Hildwin, Kenneth Stewart, Robert Roundtree, Walter Brown, Cleo Leroy, Alton Moore, Walter Kyser, Charles Pridgen, Willie Mitchell Jr., John Edwards, Arthur Rutherford, Rudolph Holton, James Harmon, Leonard Spencer, Grover Reed, Kaysie Dudley, Darryl Barwick, Mark Davis, Timothy Hudson, James Brown, Paul Brown, George Morris, Wilburn Lamb, Carla Caillier, Charlie Thompson, Alberto Farinas, George Hill, Carlos Bello, John Henry, Michael Rivera, Darrell Hallman, Arthur Schafer, Melvin Trotter, Jorge Zerquera, James Mack, Samuel Rivera, James Dailey, Manuel Colina, Andrew Williams, William Reaves, Jerry Stokes, Mac Wright, Roger Cherry, James Bryant, William Rhodes, Dee Casteel, Michael Irvine, Michael Bruno Sr., Alphonso Green, Eddie Alvin, Dominick Occhicone, Todd Mendyk, Dennis Sochor, Antonio Carter, Krishna Maharaj, Michael Keen, Doy Christian, John Freeman, Frederick Nowitzka, Clinton Jackson, Peter Ventura, Bradley Scott, Edward Castro, David Pentecost, George South, David Young, Richard Anderson, Raymond Thompson, George Porter Jr., Johnnie Boule Jr., Walter Czubak, Bernell Hegwood, Thewell Hamilton, Jerry Haliburton, Paul Johnson, Randall Jones, Robert Blakley, Edward Ragsdale, Donny Craig, Daniel Burns Jr., James Campbell, Manuel Pardo Jr., Leonard Smalley Jr., James Duckett.

EXECUTED IN 14 YEARS: John Spenkelink, Robert Sullivan, Anthony Antone, Arthur Goode, James Adams, Carl Shriner, David Washington, Earnest Dobbert, James Henry, Timothy Palmes, James Raulerson, Johnny Witt, Marvin Francois, Daniel Thomas, David Funchess, Ronald Straight, Beauford White, Willie Darden.

SOURCE: Florida Department of Corrections

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Row.

For five of those years, his case sat before the Florida Supreme Court. Like all capital cases in Florida, Bundy's sentence went to the state high court for a mandatory review. Court justices insist they weren't dragging their heels. The backlog was just too big.

Florida high court justices plow through 70 mandatory reviews each year, consuming at least a third of their time. On top of that, the justices are hit with 30 to 40 last-minute appeals.

"Let me put it this way: Capital cases are a very small part of the caseload of the Court, but we must spend a very, very, very substantial amount of time on them," says Justice Gerald Kogan. "The workload is far out of proportion with the actual number of cases."

Chief Justice Parker Lee McDonald: "If I could figure out a way to make this better or easier or quicker, I would. But I can't."

Executing Ted Bundy

Bundy's federal appeals couldn't even *start* until the state Supreme Court made its ruling. Once the federal appeals were filed, they immediately bogged down in another backlog.

Last week, the 11th Circuit Court of Appeals in Atlanta turned down a Bundy petition. The court took almost two years to decide. Some think the end is in sight for Ted Bundy. They've been wrong before.

There's nothing unusual about Bundy's case. Indeed, there are 55 death cases in Florida alone that have been in the system longer than Bundy's.

And it's getting worse. A year ago, only 275 of the 2,100 death penalty cases in America — 13 percent — had reached the federal level of appeals. Almost all of them were from Southern states. They consumed about a third of the judges' time in the 11th Circuit Court of Appeals and the Fifth Circuit in New Orleans.

From those 275 cases, the federal caseload will increase to 1,000 by 1990, according to Spangenberg, the Boston analyst. He talks of "a tidal wave" of death penalty cases about to swamp courts that have little or no experience with such appeals.

Specifically, the federal courts in California have but a single death penalty case on their dockets. Soon, the caseload will be 80. After the wave hits California, it will hit Ohio. Then Illinois, Pennsylvania, Arizona.

"What was once a Southern problem is soon going to become a national problem," Spangenberg says.

Across the nation, federal judges are looking toward Florida to size up the future. They see a 300-person Death Row. They see a five-year court backlog. They see Charles Proffitt sewing uniforms and Ted Bundy reading legal briefs.

"The judges are beginning to realize what is happening," says Spangenberg. "And they're asking: 'What the hell are we going to do?' "

Bottom line: Life in prison one-sixth as expensive

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs $150. Florida's budget for the last meal: $20. Executioner's fee: $150. Undertaker: $525, box included.

But the true cost of an execution is closer to $3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life-without-parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Michael Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.' "

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least $36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at $116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of $34,740 each, Spangenberg computed.

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: $137,410.

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Fairness was fatal blow to fast executions

DEATH / *from 1A*

about half the time. Half of all death sentences, they determined, were mishandled — and ultimately illegal. So the intense level of case-by-case scrutiny persisted.

● As more and more judges looked at more and more cases, they came up with more and more interpretations of the law. With each new interpretation, inmates found more avenues of appeal.

● Judges and juries nevertheless have embraced the new death penalty as never before. The system is now hopelessly behind. For every 30 death sentences, America has executed one person.

A solution, if it comes, would require a virtual revolution in the criminal justice system — a bloodbath of proportions never seen in the nation's history. An execution a day, every day, for decades.

"That's just not going to happen. It's never going to happen," says Carolyn Snurkowski, chief appellate prosecutor for the Florida attorney general.

"We have to figure out a way to dig ourselves out of this mess, or we need to get rid of the death penalty," says Ed Austin, state attorney for Jacksonville, the pro-death penalty dean of Florida prosecutors.

The death penalty used to work *fast* — especially in the South. The jury delivered a verdict, the judge imposed sentence and the warden readied the gallows or the electric chair. Convicted rapist Robert Hinds was executed in Florida seven days after his trial in 1937.

But with speed came outrageous excesses. Small-town judges and juries had the awesome power to decide for themselves who would live and who would die. Not surprisingly, blacks fared poorly in this lottery. Though they comprised less than 20 percent of the population, blacks made up more than half the people executed in America before 1967.

Eventually, the abuses soured the public on the death penalty. Executions ground to a halt in 1967, and the Supreme Court agreed to take a long look at the issue. After an anguished debate, the justices ruled in 1972 that all existing capital punishment laws were fundamentally unfair and thus unconstitutional.

Dependent on whim

Justice William Douglas summed up: "No standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."

This landmark decision in Furman vs. Georgia was a narrow one — the vote was 5-4. The chief justice at the time, Warren Burger, wrote the dissenting opinion, joined by current Chief Justice William Rehnquist.

Burger complained that the majority decision left the death penalty in "an uncertain limbo" and suggested that state legislatures "bring their laws into compliance . . . by providing standards for judges and juries to follow."

Burger was doubtful, though, that anyone could actually define adequate standards. Defining in advance which cases should get the death penalty, he warned, has "been uniformly unsuccessful." Each passing year shows how right he was.

State legislatures nevertheless took up the challenge to make the death penalty fair. Two approaches emerged: "mandatory" and "guided discretion."

Some states — notably North Carolina and Louisiana — tried to eliminate caprice by making the death penalty mandatory for first-degree murder. Other states — notably Florida, Georgia and Texas — adopted a process called "guided discretion."

"Guided discretion" meant that a judge and jury must weigh every capital defendant on a balance of aggravating and mitigating circumstances.

If the defendant had a prior record, if he murdered in the course of another felony, if his crime was "heinous, atrocious or cruel" — these would count as aggravating circumstances, making him or her more likely to receive the death penalty.

But if the defendant was very young, the product of a savage family or under the influence of a vicious accomplice — these would count as mitigating circumstances, tipping the balance away from death.

When the balancing was done, if the aggravating circumstances outweighed the mitigating, the death penalty would be imposed. Then the state supreme court would be required to review the decision to make sure it met the standards of the law.

The U.S. Supreme Court pondered both approaches and, on July 2, 1976, made its decision. Mandatory death sentences were ruled unconstitutional. But guided discretion passed muster, in a case called Gregg vs. Georgia.

The death penalty was saved.

Planted seeds of failure?

More and more experts are coming to believe that the court inadvertently planted the seeds of failure in its Gregg opinion. By declaring that "death is different" and demanding that *every* death sentence measure up to a complex and vague set of standards, the high court may have doomed the system to tedium and expense.

In a speech last year to the Maryland legislature, the state's chief judge, Robert Murphy, explained the problem. The very heart of the Gregg decision, he said, gives death penalty defendants "protections well beyond those required for noncapital felons." Those safe-

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guards are "extremely difficult and complicated . . . protracted and expensive."

People may wonder, the judge said, "whether the time is close at hand when most of the legal problems will have been ironed out so that death penalty appeals will be treated as routinely as other criminal appeals. I doubt seriously that that day, if it ever comes, is close at hand."

Declares Richard Burr, director of the anti-death penalty Legal Defense Fund of the NAACP: "The Supreme Court has infused through all the lower courts an attitude that says, 'If you're going to have a death penalty, you're going to have to proceed in *each individual case* with as careful a review as is humanly possible.' "

This review takes place at three levels.

First, on "direct appeal," the state courts review each death sentence to be certain that the *facts* of the case justified the ultimate penalty.

Second, on "post-conviction" appeal, the same state courts again review each case, this time to be sure that the *procedures* used to convict the doomed inmate were legal.

Third, on "habeas corpus" appeal, the federal courts determine if any aspect of the case violated the U.S. Constitution.

In theory, most of these reviews were available to doomed inmates even before the new death penalty laws were written. But in fact, in the old days, inmates were routinely executed without a glance from appellate judges.

The Furman and Gregg decisions changed all that. State supreme courts are now required to get involved. And scrutiny by the federal courts has become routine.

This puts a huge strain on the system.

An example: Every time a case hits the the federal level, a U.S. district judge is appointed to hear the appeal. At the same time, three judges of the Circuit Court of Appeals are appointed to review the decision of the first judge. And a U.S. Supreme Court justice is appointed to look over the decisions of the two lower courts.

With each step through the system, clerks must notify every judge. As the hour of doom nears, the process gets frantic.

U.S. District Judge Eugene Spellman remembers deciding one last-minute appeal at midnight. Spellman dialed the U.S. Supreme Court to notify the clerk. Could the clerk notify Justice Lewis Powell?

"He's right here," came the reply. "Why don't you tell him yourself?"

How often must a Supreme Court justice sit in his chambers, poised by the telephone, at midnight? Consider this: There are more than 2,100 cases in America's execution pipeline. The conclusion is inescapable: *Something has to give.*

Death penalty advocates have long hoped that courts will be forced to streamline the process. They have interpreted nearly every important death penalty decision as a sign that courts were abandoning tedious case-by-case review. Again and again, pro-death penalty politicians have predicted that the logjam was broken.

That was the prediction in 1979, when Florida electrocuted John Spenkelink. Officials confidently forecast six more executions in the coming year. But they were wrong — four years passed before the next execution.

Around the nation, death penalty advocates greeted favorable U.S. Supreme Court decisions in 1984 and 1986 as paving the way for quicker executions. Yet the execution rate nationwide hasn't accelerated. Quite the opposite: There were 2.08 executions per month in 1987; 1.17 per month so far in 1988.

In fact, there is little reason to believe that the judges will ever back off. Under the Gregg decision, they feel it is their duty to review every case. And, disturbingly, the judges keep finding major mistakes.

Half overturned on appeal

About half of all death sentences have been overturned on appeal since the "guided discretion" concept became law. Federal courts knock out about a quarter of the cases — even after the state's double-barreled review.

"There is a widespread sense that all this is just a matter of delays, that eventually everyone on Death Row is going to be executed. Well, that's just not the case," says Burr, of the NAACP. "How can you cut short someone's appeals when he stands a 50-50 chance of a major error?"

Yet case-by-case review has a disastrous effect on the legal system, prosecutors and defense attorneys agree. Laws are supposed to be predictable, solid as a rock. The failure of death penalty law, lawyers argue, is that it shifts and changes with each new lawyer arguing a new case to a new judge.

Instead of rock-solid, death penalty law is quicksand.

"The essence of the law is its predictability. The law is supposed to be coherent, consistent," says Pat Doherty, a Clearwater attorney who defends Death Row inmates. "Under the death penalty, all this is meaningless. The death penalty is a cancer on the law."

Exhibit A: Charles Proffitt, who murdered a sleeping man with a bread knife in Tampa in 1973.

In 1975, the Florida Supreme Court ruled that the facts of the case justified the death penalty. But over the years, as Proffitt's appeals crawled through the courts, the law subtly shifted.

In 1987, after a federal court ordered a new weighing of the aggravating circumstances, the state Supreme Court — the very court that had turned Proffitt down years before — spoke again.

This time, the court had a new sense of what made a murder especially "heinous, atrocious or cruel." Proffitt — who had not planned his crime, tortured his victim or compounded his crime by attacking his victim's wife — no longer met the test. The court reduced his sentence to life.

So a man who deserved the death penalty in 1975 didn't deserve it 12 years later.

"We're in a quandary of trying to hit a moving target," says Art Wiedinger, assistant general counsel to former Gov. Bob Graham. "The law keeps changing. The courts may make a ruling today that suddenly means something we did five years ago was wrong."

The changing law affected only one person in Prof-

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fitt's case. Often, though, shifts affect scores of condemned men. A U.S. Supreme Court decision last month will mean new appeals for 15 of the 19 inmates on Maryland's Death Row.

Arthur England, former chief justice of the Florida Supreme Court, lost hope of making death penalty law consistent.

"I thought the Supreme Court of Florida would be able to set standards that made sense that we could enforce," he says. "Because the legal system must be predictable. My experience on the court was that it's impossible to set standards and adhere to them. Predictability is not available in this area and it won't be."

One last hope of death penalty advocates: Ronald Reagan's conservative judges will swing the tide toward swifter executions. But even this hope is growing dim.

Seven of the nine U.S. Supreme Court justices support capital punishment. Four are Reagan nominees. Yet they continue to hear capital cases at a rate unimaginable before Furman and Gregg. Already this year, the high court has ruled on nine separate cases — without drastically changing anything.

Even Chief Justice Rehnquist, the most determined pro-death penalty voice on the court, concedes that capital punishment requires "especially careful review of the fairness of the trial, the accuracy of the fact-finding process and the fairness of the sentencing."

"No appeal is a 'mere technicality,' " says Florida Supreme Court Justice Gerald Kogan. "Technicalities are the law. So people can say, 'That's a technicality,' but we have to answer: 'Yeah, but that's what the law is.' "

More and more, it appears that the problem is the law itself.

Says Parker Lee McDonald, chief justice of Florida's high court: "The old cases never really go away, and the new ones just keep coming. The way the system is cranked in now, I think we're probably running pretty near maximum speed."

Maximum speed. In the 12 years since the "guided discretion" concept resuscitated the death penalty, America has executed 88 inmates against their will. Twelve more men quit their appeals and went to the death chamber willingly. Total: 100 executions.

Death Row, by comparison, grows at the rate of 300 death sentences a year.

Ed Austin, the pro-death penalty Jacksonville prosecutor, is just about ready to pull the plug.

"If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty," Austin says. "The Supreme Court should fix it or get rid of it. If the court doesn't want to come to terms with this, then somebody should step in and say, 'It's a joke. It doesn't work. It's a shell game.' "

PROTECTING THE INNOCENT

The ultimate malfunction of justice is the execution of an innocent person. Fourteen times since 1973, justice in America has come close. Judges sentenced innocent men to die. Only the laborious appeals process saved them. One case took 13 years to correct.

▶ **JOSEPH GREEN BROWN, 23, Florida:** ***Sentenced 1974. Freed 1987.***

A petty crook with a conscience, Brown confessed to a burglary he committed with an accomplice. The accomplice got even by accusing Brown of murder. Eventually, experts declared that Brown's gun wasn't the murder weapon. After more than a decade, the accomplice admitted he lied.

▶ **EARL CHARLES, 21,** Georgia: ***Sentenced 1975. Freed 1978.***

After conviction, new evidence surfaced establishing his alibi. A federal judge ordered the state to compensate Charles in 1983 because a police officer violated his civil rights.

▶ **NEIL FERBER, 35,** Pennsylvania: ***Sentenced 1982. Freed 1986.***

Prosecutors became convinced the star witness against Ferber lied. An eyewitness to the murder came forward to say Ferber was not the killer. When a new trial was ordered, charges were dropped.

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▶ **GARY L. BEEMAN, 25,** Ohio: *Sentenced 1976. Freed 1979.*

An escaped prisoner, Clare Liuzzo, was the star witness against Beeman. When an appeals court ordered a new trial, five witnesses testified that Liuzzo bragged about committing the murder himself. Beeman was acquitted.

▶ **LARRY HICKS, 19,** Indiana: *Sentenced 1978. Freed 1980.*

Judge ordered a new trial because Hicks, who had a 'low-to-normal' IQ, had been too confused to assist his lawyer. At the new trial, Hicks' alibi was proved.

▶ **JOHNNY ROSS, 16,** Louisiana: *Sentenced 1975. Freed 1981.*

Convicted of rape. The youthful Ross confessed after police beat him. His trial lasted less than a day. Eventually, defense lawyers established that Ross' blood type did not match the sperm found in the victim.

GLADISH

GREER

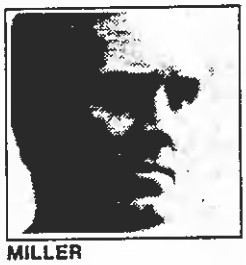
KEINE

SMITH

▶ **THOMAS V. GLADISH, 23; RICHARD WAYNE GREER, 31; RONALD B. KEINE, 27;** and **CLARENCE SMITH JR. 30,** New Mexico: *Sentenced 1974. Freed 1976.*

Convicted of murder, kidnapping, sodomy and rape. Detroit News reporters traced the murder weapon and getaway car to a drifter in South Carolina. The drifter confessed.

JENT

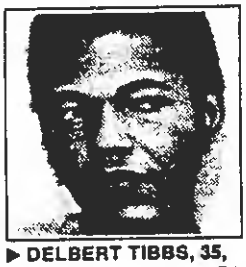


MILLER

▶ **WILLIAM RILEY JENT, 28,** and **EARNEST LEE MILLER, 23,** Florida: *Sentenced 1980. Freed 1988.*

A federal judge found police withheld key evidence to back up the Jent-Miller alibi. Police overlooked the victim's boyfriend, whose next girlfriend was also beaten to death and burned. When a new trial was ordered, prosecutors offered to free Jent and Miller immediately if they would plead guilty to a lesser charge. While asserting their innocence, the half-brothers accepted the deal.

SOURCES: Herald research and Hugo Adam Bedau's and Michael Radelet's *Miscarriages of Justice* in the Stanford Law Review. These 14 cases are the most clear-cut. In scores of cases, significant doubts remain.



▶ **DELBERT TIBBS, 35,** Florida: *Sentenced 1974. Freed 1976.*

Victim's girlfriend, who was raped by the killer, gave a description of the attacker — which didn't match Tibbs. But she testified against him anyway. Tibbs, a hitchhiking divinity student, had a motel registration to support his alibi. Florida Supreme Court set him free. Prosecutor admitted the trial wasn't fair.

▶ **JONATHAN CHARLES TREADAWAY JR., 21,** Arizona: *Sentenced 1975. Freed 1978.*

Convicted of sodomy and murder of a 6-year-old boy. At retrial, five pathologists testified that the victim probably wasn't murdered or sodomized — that he probably died of pneumonia.

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TODAY
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MONDAY
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The Miami Herald

1 2 3 4 5 6 7 8 9 10 TUESDAY, JULY 12, 1988 F-2 Contents Copyright 1988 The

Political pressure thwarts clemency

By DAVE VON DREHLE
Herald Staff Writer

Meet Vernon Cooper, the man on Death Row no one wants to execute.

Cooper may have murdered a policeman in 1974. Then again, maybe not. Cooper says his accomplice did it. The policeman and the accomplice are both dead. Since there were no other witnesses, no one knows for sure.

THE DEATH PENALTY
A FAILURE OF EXECUTION
Third of a series

In the heyday of the death penalty, Florida's governor probably would have granted executive clemency and reduced death to life in prison. For years, governors used this technique to dispose of marginal cases.

But today, in Florida, executive clemency is just one more aspect of the death penalty that doesn't work right.

Clemency exists only in theory, like UFOs and Bigfoot.

Since 1982, Govs. Bob Graham and Bob Martinez have reviewed 158 clemency requests — and granted zero.

The reason, some experts contend, is politics. No politician ever won an election by dispensing mercy to murderers.

"Theoretically, clemency could

Turn to **DEATH** / *10A*

Politics thwarts executive clemency

Death penalty a vital issue among voters

DEATH / *from 1A*

be used to clear away all the marginal cases and speed up executions," says Bob Spangenberg, a Boston attorney who has studied criminal law and the death penalty for 24 state and federal agencies.

"In reality, though, it's political."

Paradoxically, political pressure *in favor* of the death penalty is one reason the death penalty doesn't work.

In Florida, this happens three ways:

- By shunning the clemency process, governors have ignored an opportunity to cut court overload and streamline capital punishment.
- By signing a lot of death warrants, governors look tough on crime. But warrants signed willy-nilly merely increase the cost of capital punishment — by at least a third.
- By overriding jury recommendations for life in prison, judges look tough, too. Yet an astonishing number of these cases — seven out of 10 — are reversed after lengthy and expensive litigation.

Across the nation, the death penalty is taking on more and more political significance. Yet in the statistical world of murder, it counts for very little.

The 2,100 inmates on America's Death Rows account for less than two percent of the murders committed in the past 15 years.

Inmates actually executed — 100 — account for less than one-tenth of one percent of the nation's homicides.

The issue flourishes

Still, the death penalty issue flourishes in campaigns for state legislatures, governors' mansions, court benches, the halls of Congress — even the White House.

Strategists for Vice President George Bush already are attacking Democrat Michael Dukakis for opposing the death penalty.

"This is going to be part of the national debate," says Gov. Martinez, a prominent Bush man.

Candidates of every stripe affirm their belief in the death penalty almost as a code, symbolic of their hard line against crime.

People used to call Bob Graham a wimp. Not anymore. His strong support for the death penalty helped transform him into a U.S. senator and a finalist for the Democrats' vice president nomination.

Graham's pro-death penalty record, some say, makes him a perfect running mate for the vulnerable Dukakis.

The death penalty bandwagon is crowded. Witness the most recent race for governor of Florida.

"I voted for the death penalty," boasted candidate Barry Kutun, Miami Beach senator.

"I've always, always supported it," declared candidate Harry Johnston, former Florida Senate president.

"I'll pull the switch personally," said candidate Joan Wolin, Lake County lawyer.

"If I am elected, Florida's electric bill will go up," promised candidate Tom Gallagher, Coconut Grove representative.

Candidate Bob Martinez, mayor of Tampa, won.

"Bob Graham politicized the death penalty and he set the standard for Bob Martinez," says Larry Spalding, a Graham appointee who directs an office of defense attorneys on behalf of Florida's doomed inmates.

Political motives?

Graham calmly denies that his death penalty agenda has been political. He consulted his "inner gyroscope," he says, and found his actions above reproach. Critics nevertheless see political motives behind the strange death of executive clemency in Florida.

Between 1925 and 1965, Florida's governors granted clemency in 57 of 268 capital cases — 21.3 percent.

In his first three years in office, Graham approached that pace. He granted clemency in six of 38 cases — 15.8 percent.

But Graham discovered that granting clemency risks political backlash. After he spared the life of Learie Leo Alford in 1979, Republicans denounced the governor. Alford's father, the Republicans noted, was a preacher active in Democratic politics.

After he spared the life of Darrell Hoy in 1980, parents of one of Hoy's victims deluged Graham with angry petitions.

In January 1982 — the year Graham ran for a second term — clemency vanished, never to be seen again. Although everyone on Death Row gets a clemency hearing, everyone on Death Row stays there.

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Graham and Martinez explain: The system got better. The courts now weed out marginal cases before they get to the clemency board.

"After the first few years I was in office, the courts laid out sufficient standards, so cases that came through the process didn't leave much basis for clemency," says Graham.

Says Martinez: "Cases go through so many judges, they get sorted out pretty well."

In fact, though, marginal cases never stopped popping up. So, in place of clemency, Graham's staff quietly developed a way to sidetrack executions without making headlines.

Shift in tactics

The governor simply neglected to sign death warrants in cases that left him uncertain. No defendant can be executed without a warrant. Graham employed this tactic 20 times.

These cases, says Art Wiedinger, Graham's former assistant general counsel, "go into a sort of limbo."

Thus, Vernon Cooper, sentenced to death 14 years ago for the shooting of a Pensacola sheriff's deputy, remains on Death Row — though no one is trying to execute him. Jacob John Dougan, 13 years on Death Row, is in limbo. Eligaah Jacobs, 12 years on Death Row, is in limbo.

Limbo is politically safe. But at the same time, it does nothing to relieve the burdens of the system.

Martinez says he doesn't expect to grant clemency any more than Graham did. He can't imagine circumstances that would convince him to reduce even one sentence.

"I guess I'll know it if I hear it," he says.

Today's clemency hearings are a Catch-22: The obvious way to win clemency is to be innocent. But every session begins with an admonition not to argue innocence.

"It is presumed," says Wiedinger, Graham's assistant counsel, "that the defendant is guilty."

In most cases, shortly after the clemency hearing, the governor signs the black-bordered death warrant. A date is set, usually 30 or 60 days later.

But most warrants don't really mean death. The courts issue a "stay of execution" while they weigh emergency appeals. While the judges are pondering, the warrants expire, and new ones must eventually be signed.

For every execution since 1973, Graham and Martinez have signed more than 10 warrants.

Warrants vs. executions

Critics say that the governors use death warrants as a vote-getter — the more warrants, the more votes. But more warrants don't mean more executions.

The Martinez record: 44 warrants, two executions.

Martinez argues that warrants are the only prod he has to keep cases moving. Defense attorneys can't stall if facing a date with the electric chair.

But using warrants to move capital cases is like using a sledgehammer to break an egg — it gets the job done, but makes a terrible mess.

When a warrant is signed, the system lurches into an expensive and inefficient overdrive. Everything costs more. Instead of mailing documents, lawyers use overnight express couriers. Airline tickets to distant courtrooms, booked on short notice, are always full-fare.

Judges must drop everything.

"When a death warrant is signed," says Florida Supreme Court Justice Gerald Kogan, "we get hit with appeals that are — and this is no exaggeration — a *foot* high. A thousand, 1,200 pages each.

"When we are served with this much documentation just a short time before an execution is scheduled, everything grinds to a halt while we deal with it."

Graham signed more death warrants than any Florida governor before him. But he always took care never to have more than four death warrants in effect at one time. "That was as much as the system could handle," Graham says.

Last month, by contrast, Martinez had *nine* warrants alive at the same time.

"That," says Justice Kogan, "creates a tremendous problem for us."

All nine warrants expired without an execution.

"We sign death warrants to move cases along — knowing full well that they're not going to get to the electric chair," Martinez explains. "Without the warrant, the case would just sit there."

Martinez considered Graham's four-warrant limit, but didn't like it. "Every office holder has to use his own judgment," he says.

The court's timetable

To simplify things, the Florida Supreme Court set a timetable for state appeals. This provides a way to keep cases moving without death warrants.

But Martinez has ignored the timetable. "There's nothing magic about the deadline," says Andrea Hillyer, Martinez's top death penalty lawyer.

Each time the timetable is ignored, Martinez sets off a costly warrant panic. An example: Fred Way, a Tampa man convicted of the arson-murder of his wife and daughter. His death warrant was signed last month.

Way had six months left under the timetable. When his warrant was signed, appellate lawyers on both sides had just days to study reams of court documents and write their legal arguments. They dumped everything on the appellate courts.

Costs soared. Judges called emergency hearings, halting the execution long enough to ponder the issues.

After weeks of frenzied labor, the warrant expired. Way's case stalled again. All this for a case that would have moved by itself in a couple of months anyway.

For years, people have talked about fixing the warrant problem.

Spalding, chief of the appellate defense lawyers, says he proposed a compromise with the governor: Both sides agree to deadlines for all appeals. As long as the deadlines are met, the governor would lay off the warrants.

"He'd sign fewer warrants and get more executions," Spalding says. But the governor wouldn't buy it.

Baloney, answers the governor.

"We tried to work with him," says Joe Spicola, the governor's general counsel. "We are perfectly willing to work things out. But we are not going to sit back and let them prostitute the process."

The feud is poisoning an already ailing system. Martinez ordered an investigation of Spalding. Spalding bashes Martinez to judges and the press.

And each week in Florida, another killer steps into the costly line to the seldom-used electric chair.

(continued)
The Miami Herald
Tuesday, July 12, 1988
10A

CLEMENCY CONFUSION

The clemency board said no, but a federal judge said Florida "lost sight of the ultimate goal" of justice in the case of William Riley Jent (center) and Earnest Miller.

IT'S NOT easy to tell the winners from the losers.

YES: Learie Leo Alford won clemency in 1979 because there was no physical evidence linking him to the rape-murder of a 13-year-old girl. And Alford's lawyer produced a witness who testified that Alford was innocent. Serving life in prison.

NO: Lawyers for William Riley Jent and Earnest Lee Miller stood before Graham and the cabinet to ask for clemency in 1983. No physical evidence linked the half-brothers to the torch-murder of an unidentified young woman. And three witnesses came forward to say that Jent and Miller were innocent. In 1988, Jent and Miller were freed, after a federal judge said Florida "lost sight of the ultimate goal" of justice.

YES: Darrell Edwin Hoy's case reached the clemency board in 1979. Two facts stood out: Hoy's jury had recommended a life sentence and Hoy's accomplice had won a new trial on appeal. Serving life in prison.

NO: Beauford James White's case reached the board in 1982. White didn't kill anyone — he was an accomplice to a Carol City mass murder. Two facts stood out: White's jury had recommended a life sentence and one accomplice was sentenced to just 20 years. In 1987, White was executed.

YES: Jesse Raymond Rutledge pleaded for mercy in early 1982. His lawyers argued Rutledge was innocent — that the key witness was pressured to finger the wrong killer. Serving life in prison.

NO: Joseph Green Brown asked for mercy late in 1982. His lawyers argued he was innocent — that the key witness blamed him because of a grudge. In 1986, a new trial was ordered. The next year, charges were dropped.

Former Gov. Bob Graham won't discuss these cases. But he argues that clemency cases are not necessarily supposed to make sense from one to the next. 'They are not meant to set precedents,' he says. Instead, he compares the governor's power to grant clemency to the power of kings in old England, not to be used 'on a wholesale basis.'

'Judicial override' bogs system down

By DAVE VON DREHLE
Herald Staff Writer

A convicted killer stands before the judge. The jury recommends life in prison. But the judge imposes the death penalty.

This has occurred on 113 occasions in Florida since 1973. In more than 20 percent of the state's 544 death cases, judges sentenced to death defendants whom juries thought should live.

It is called "judicial override." For judges, it can be good publicity. For the legal system, it can be trouble.

In seven out of 10 "judicial overrides," higher courts reverse the trial judge — after long and costly appeals. Every time this happens, Florida taxpayers unwittingly shell out at least $69,480, according to conservative cost estimates — or $5 million thus far.

Says Bennett Brummer, Dade Public Defender: "Juries are supposed to be representative of the community. If a jury recommends that the defendant's life should be spared, then I feel the judge should be bound by that."

Jacksonville Circuit Judge Hudson Olliff is one of only two Florida judges whose override death sentences have actually ended in executions. Child-killer Earnest Dobbert was electrocuted on Olliff's orders on Sept. 7, 1984.

"Only a defense attorney would criticize the override," says Olliff.

Florida lawmakers created the judicial override late in 1972, as they rushed to write a new death penalty law after the U.S. Supreme Court declared the nation's existing capital punishment laws unconstitutional.

Existing death penalty laws gave juries too much power to decide who should live and who should die, the Supreme Court ruled. So in drafting the new law, Florida's legislators gave judges the power to disregard the jury's recommendations.

Now critics argue that the judges have too much power.

Other than Florida, only Alabama and Indiana permit judicial override. Only Florida judges use it extensively — so extensively that the Florida Supreme Court has been forced to set tough standards for policing the use of overrides.

Without these time-consuming standards, "the death penalty would be untenable in Florida," according to Supreme Court Justice Gerald Kogan.

It works the other way — but rarely. Angry citizens picketed Dade Circuit Judge Steven Robinson after he gave a life sentence to Jesse Ramirez in the "Duct Tape Murder" of Mario Portela.

No judge believes in the override more than Dade Circuit Judge Ellen Morphonios, known as "Maximum Morphonios" for her harsh sentences. *60 Minutes* and *NBC Nightly News* have filmed her in action.

"If I feel that's the thing that ought to be done, then I'll do it," she says.

Morphonios overrode the jury and sentenced Anibal Jaramillo to death in a 1981 drug-murder case. The justices of Florida's Supreme Court found her reasoning so unpersuasive they not only reversed the sentence, they turned Jaramillo loose.

In fact, all of Morphonios's nine death sentences have been reversed on appeal. The celebrity judge is unperturbed.

"You know there's a good chance the case is not going to fly, but you've got to live with yourself. If the people don't want an override, then let the Legislature change it."

A lot of people like that idea. Given the high cost and low success rate of judicial overrides, experts are increasingly calling for the elimination of this quirk in Florida's death penalty law.

"Face it," says Larry Spalding, Florida's chief Death Row defense lawyer. "If you can't convince the majority of a jury to impose the death penalty, then it's not a death penalty case."

"If the people don't want an override, then let the Legislature change it."
Ellen Morphonios, DADE CIRCUIT JUDGE

NO MERCY

In Florida, every doomed inmate has the right to a hearing before the governor and Cabinet prior to being executed. Circumstances overlooked, or undervalued, at the trial may convince the governor and Cabinet to reduce the death sentence to life in prison. Between 1925 and 1965, Florida's executives found more than one case in five worthy of clemency.

Under Bob Graham and Bob Martinez, however, the clemency process has withered and died.

Governor	Term	CLEMENCY Requests	Granted	Pct.
Martin	1925-29	48	7	14.6
Carlton	1929-33	19	8	42.1
Sholtz	1933-37	24	3	12.5
Cone	1937-41	30	12	40.0
Holland	1941-45	39	4	10.3
Caldwell	1945-49	27	4	14.8
Warren	1949-53	19	2	10.5
Johns	1953-55	8	2	25.0
Collins	1955-61	38	9	23.7
Bryant	1961-65	16	6	37.5
TOTAL		**268**	**57**	**21.3**
Graham	1978-86	144	6	4.1
Martinez	1986-	58	0	0.0
TOTAL		**202**	**6**	**3.0**

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1 2 3 4 5 6 7 8 9 10 WEDNESDAY, JULY 13, 1988 F-2
Contents Copyright' 1988 The Miami Herald

Cries for change

Both sides see flaws in capital punishment

By DAVE VON DREHLE
Herald Staff Writer

THE DEATH PENALTY
A FAILURE OF EXECUTION
Last of a series

In 1974, the year President Nixon left the White House and Americans lined up at the gasoline pumps, Charles Proffitt waited for the executioner on Florida's Death Row. Proffitt had stabbed a sleeping man with a bread knife.

Nearby waited Howard Douglas, the killer a jury thought should live and a judge thought should die. Vernon Cooper, who may or may not have killed a policeman, waited, too.

The executioner never came. In fact, if Florida's Death Row Class of '74 held a reunion, two-thirds of the inmates could attend.

In bluntest terms, the death penalty was supposed to kill these men. It failed, as it has failed in 97 percent of America's death cases in the past 15 years.

Scholars, lawyers, judges — even pro-death penalty politicians — conclude that such a dramatic failure demands change: Fix it or get rid of it. They propose a bunch of solutions, most of which would do neither.

Proffitt, Douglas and Cooper were among the first killers sentenced to die under new laws intended to make the death penalty rational and swift.

But just one in 30 people sentenced to death under those laws has been executed — leading some experts to argue that the laws aren't very rational. As for swift — consult the Class of '74.

America's death penalty enterprise has cost millions. Courts and legislatures have anguished uncounted hours. Capital punishment has driven an emotional wedge through the ranks of the law-abiding.

Now, attention is focused on a few highly publicized

Turn to **DEATH** / *12A*

Fix it or get rid of it, experts say

DEATH / *from 1A*

cases — Ted Bundy's, for example. Undoubtedly, much of an angry public would hail the execution of Bundy as the triumph of capital punishment — cost, delay and frustration be damned.

And yet, the truth is that the death penalty is a failure in the overwhelming majority of cases. Almost everyone is dissatisfied, from advocates who demand vengeance to opponents who mourn each death.

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions:

Limit those eligible for execution

In most states, it is legal to execute juveniles and the mentally retarded.

But most Americans strongly oppose the idea of executing the mentally retarded. For example, a 1985 poll conducted in Florida showed eight of 10 people opposed. Americans also tend to oppose executions of juveniles — though many are undecided.

James Terry Roach was 17 and had an IQ of just 64 when he and two pals murdered a young couple in Columbia, South Carolina in 1976. A decade later, in 1986, Roach was electrocuted — despite pleas for mercy from Mother Teresa and the United Nations.

Increasingly, people argue that killers like Roach should not be executed. The Georgia Legislature recently outlawed executions of the retarded, and next year, the U.S. Supreme Court will take up the question of the death penalty for juveniles.

But eliminating juveniles wouldn't reduce the numbers noticeably: Only 32 of the more than 2,100 inmates on America's Death Rows were sentenced before their 18th birthday.

Joe Spicola, general counsel to Florida Gov. Bob Martinez, balks on principle. "A lot of our worst criminals are juveniles," he says. "You wouldn't believe some of the things they do."

No one knows how many condemned inmates are retarded. Some experts say hundreds. Even so, removing them from the process would not make a crucial difference to the nation's overloaded courts.

Executing the insane is a more difficult problem. Although laws forbid it, judges differ drastically on who's crazy and who isn't.

Anthony Antone, 66, his brain damaged by syphilis, did not meet the standard. He went to Florida's electric chair in 1984 convinced that when the surge went through him, his spirit would emerge via his pineal gland, ascend through the nine layers of the Universe, and come to rest on a throne from which he would rule the world.

David Funchess, executed by Florida in 1986, was diagnosed as suffering an uncontrollable violent reaction to the stress of Vietnam.

Criminologists have argued for decades over what constitutes insanity. Even if they agreed, the cost of thousands of lengthy psychiatric evaluations would be staggering.

Take politics out of the system

Florida's governors have not recommended clemency in a capital case since 1982. Their explanation is that the appeals process has become so refined that no marginal case gets as far as a clemency hearing.

In fact, though, Bob Graham and Bob Martinez acknowledge they have had substantial "problems" with 10 percent to 20 percent of the cases they have reviewed. Rather than reducing these sentences to life in prison, they have pitched them into limbo by refusing to sign death warrants.

Critics say Florida's governors don't grant clemency because it is politically unpopular. They believe the political dangers are exaggerated.

One of America's most popular governors, New York's Mario Cuomo, has twice vetoed capital punishment bills. When advocates complain, Cuomo answers: "If you like capital punishment so much, don't vote for me." Cuomo won re-election in a landslide.

Larry Spalding, director of the state agency that handles Death Row appeals, says Florida could "dramatically improve" the situation in another way: Eliminate "judicial override."

In more than 20 percent of Florida's capital cases judges have imposed the death penalty after juries recommended life. High courts have reversed seven out of 10 of these "judicial overrides."

Combined, elimination of judicial override and a meaningful clemency process could cut Florida's death penalty overload by 30 percent to 40 percent.

Florida could further reduce the overload by requiring jurors to agree unanimously on the death penalty, as most death penalty states do. This is less extreme than it appears at first, because prosecutors may exclude any potential juror who is categorically opposed to death penalty.

Guarantee first-rank lawyers at trial

Death penalty laws are extren complicated, and most criminal fense lawyers don't have much perience with capital cases. "L schools don't teach about the de penalty because there's no mone it," says Clearwater defense att ney Pat Doherty, a veteran De Row lawyer.

And because the vast majority defendants are poor, they are rep sented by court-appointed att neys.

"They tend to be lawyers v have small general practices — real estate closing Monday, an contested divorce Tuesday an capital murder case Wednesda says Bob Mahler, director o North Carolina agency that off advice to death penalty defense torneys. "It's the equivalent of ing to a general practitioner for n rosurgery. No matter how good general practitioner is, he can't it."

Statistics show that first-r lawyers lose fewer cases. Defe lawyer Doherty cites Steven B son, the tobacco heir who pi bombed the family car.

"He blew up his family, *for mo* and didn't get the death pena The only difference between B son and people on Death Row is t Benson had the greatest of all n gating circumstances: He was r and rich people don't get the de penalty."

Hiring top lawyers for capital fendants would reduce the De

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Row population. It would also reduce the enormous energy courts expend on appeals based on incompetency of defense lawyers.

New York proposed such a law several years ago. Predictably, it failed because taxpayers would have to pay millions for hot-shot lawyers.

Set time limits for federal appeals

Death Row defense attorneys have a favorite tactic for exploiting the federal courts to keep their clients alive, and their critics want to tighten up the rules.

Instead of filing one appeal that includes every imaginable argument for reducing the defendant's sentence, the lawyers file a separate appeal for each argument.

One at a time.

"If they have, say, three issues for the federal courts, they bring federal issue No. 1 first," explains former Florida Gov. Bob Graham. "When that appeal is completely finished, they bring federal issue No. 2. *Then* federal issue No. 3. And so on."

For six years, Southern legislators — including Florida's U.S. Sen. Lawton Chiles — have backed a bill to put a stop to that. Appeals would be lost forever if they weren't filed within a year after state appeals were exhausted.

Says Gov. Martinez, a strong proponent of Chiles' bill: "Let's agree on a time line. I think that would greatly enhance the whole system."

Defense attorneys fear the concept is flawed. In some cases, alibi witnesses refuse to talk until years after a trial. In others, facts that might exonerate a doomed inmate remain buried in old police files.

Earnest Lee Miller was convicted of the 1979 torch-murder of a Pasco County woman. Six years passed before fingerprints were located to show that the prosecutors had the wrong victim. Another year passed before a judge ordered police to turn over their files — which contained hidden testimony that supported Miller's alibi.

"I'm not going to argue about whether the death penalty is right or wrong," says Sandy Weinberg, a Tampa attorney who represented Miller. "But there is no question the system can't go faster as long as we've got cases like Earnie Miller's."

The Chiles bill — which has yet to get out of committee — contains provisions that address these fears. But defense attorneys argue that the provisions will not do much good if information surfaces after the defendant is dead.

Limit death penalty crimes

If the death penalty applied to fewer crimes, there would be fewer inmates on Death Row, fewer appeals burdening the courts, and more likelihood that condemned criminals would actually be executed.

Capital murders are supposed to be the most gruesome and vicious. People generally agree this makes sense in theory — but in practice, courts have had a very hard time distinguishing one murder from the next.

Some experts have proposed more specific laws. A death penalty only for killers of police officers, for example. Or a death penalty only for people who kill while serving a life sentence. Or a death penalty only for serial murderers — such as Ted Bundy.

These severe restrictions would permit society to keep the death penalty as an "ultimate penalty" — while greatly reducing the overload.

Abolish the death penalty, establish tougher life sentences

More and more people are asking whether something so costly, slow and inefficient as the death penalty is worth the trouble.

Florida Supreme Court Justice Parker Lee McDonald: "I think society needs to ask itself if the results justify the cost."

Former Florida Supreme Court Chief Justice Arthur England: "Is the value derived really worth all the trouble?"

Public confidence erodes as America pours millions each year into a system that doesn't work. And people wonder if the money couldn't be better spent.

"The same people who are saying, 'What about the victim?' are actually depriving the victims of services," says Jonathan Gradess, who studied the cost of the death penalty for the New York Assembly.

"We're spending millions on the death penalty. Why don't we put that money into counseling and compensation for the survivors who have lost a loved one and a breadwinner?"

The New York lawyer took note of Florida's most recent execution: "It's fine for Bob Martinez to stand up and pull the switch on Willie Darden, but I don't see him writing any checks to the widow."

In place of the death penalty, North Carolina's Mahler proposes a tough alternative: Lock 'em up and throw away the key.

"There are people on Death Rows who should never see the light of day," he says. "But this can be accomplished without a death penalty, and much, much cheaper — through life-without-parole that *really means* life-without-parole."

Such sentences are rare in America. Opponents argue it would be more cruel than execution. Some prison officials worry that these lifers would wreak havoc because they would have no incentive for good behavior.

But the idea of an ironclad life sentence instead of death is popular among Americans, according to several recent polls.

When asked simply whether or not they support capital punishment, 70 percent of Americans say yes. But when asked whether they prefer the death penalty over life-without-parole, the answers are evenly split.

And by a narrow majority, Ameri-

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DEMANDING CHANGE

Nationwide, polls show that 70 percent of Americans favor the death penalty. In Florida, the number is higher. But Floridians also favor substantial changes in the law.

Do Floridians favor or oppose capital punishment?

Strongly favor	67%
Somewhat favor	19%
Somewhat oppose	3%
Strongly oppose	10%
Don't know	1%

How do Floridians feel about the death penalty for the mentally retarded?

Favor	14%
Oppose	79%
Don't know	8%

How do Floridians feel about the death penalty for juveniles?

Favor	38%
Oppose	46%
Don't know	17%

Do Floridians prefer life in prison over the death penalty, provided the inmate works in a prison industry and his wages go to a fund for the survivors of murder victims?

Yes:	53%
No:	38%
Don't know:	10%

SOURCES: The Gallup poll, Cambridge Survey Research.

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cans *prefer* a life sentence — provided the defendant is made to work and his prison wages go to a fund for survivors of murder victims.

Some individuals, of course, stand by the death penalty as a matter of principle. No failures of execution will ever convince them to abandon it.

Gov. Martinez makes the case: "There must be an ultimate penalty. The death penalty is an expensive instrument — but it's an instrument of justice. And there should not be a cost factor on justice. You can't put a value on it.

"Even just one execution in a year shows that justice is being done, that it can work," says the governor.

For others, though, the time has arrived to put the death penalty on trial.

"It is a public policy question that must be decided," says Bob Spangenberg, a Boston lawyer who has advised 24 state and federal agencies on legal costs and the death penalty.

"The question is: When it gets down to decisions about health, education, law enforcement, highways — is the death penalty worth it?"

IS THE DEATH PENALTY DOOMED?

When judges, prosecutors and governors talk about the death penalty, more and more they talk about failure. Even staunch supporters are saying it may be time to give up.

'It is a quagmire. If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short. If a criminal feels that even if he's sentenced to death, the punishment won't be carried out, then that removes the rationale for capital punishment.'

Bob Graham, former governor of Florida, who signed more death warrants than any other Florida governor

'[We] have gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must . . . rely has been all but completely sacrificed.'

William Rehnquist, chief justice of the U.S. Supreme Court, the court's strongest supporter of the death penalty

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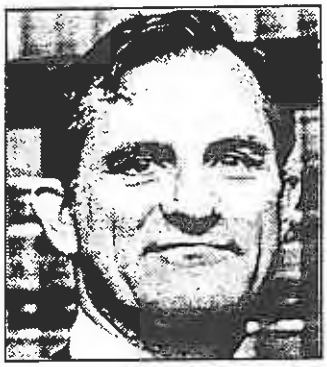
'If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty. When the execution comes 12 years after the crime, nobody remembers why you're doing it. The Supreme Court has a duty to fix it or get rid of it.'

Ed Austin, pro-death penalty state attorney for Jacksonville



'I think society needs to ask itself if the results justify the cost.'

Parker Lee McDonald, chief justice of the Florida Supreme Court

'The way things are now, it's a surprise when anybody goes to the chair. If they're not going to go through with it, then why have a death penalty on the books? It's the Legislature's job to decide.'

Ellen Morphonios, Dade circuit judge, who has sentenced nine people to die

ABOUT THIS SERIES

SUNDAY
The death penalty costs a lot and delivers little. And the situation is getting worse.

MONDAY
After the death sentence: Why does the appeals process take so long?

TUESDAY
The death penalty is good for politicians, but politicians are bad for the death penalty.

TODAY
What can be done? A look at proposals to fix the death penalty, and a tough alternative.

The Miami Herald

1 2 3 4 5 6 7 8 9 10 SUNDAY, DECEMBER 11, 1988 F-1 Contents Copyright©1988 The Miami Herald

End nearing for Death Row's No. 1 killer

Ted Bundy makes his last stand

Does it worry me? No. If it's going to happen, it's going to happen. I've always had the death penalty. It's just a matter of knowing when.
— **Theodore** Robert **Bundy**

By DAVE VON DREHLE
Herald Staff Writer

The hour approaches.

The nation's clogged, inefficient death penalty machinery grinds toward a rare resolution.

The only execution that matters in the minds of millions looms from the mists of delay.

Ted Bundy, an unforgettable killer amid the forgotten human wreckage of America's swollen Death Row, waits stoically on his petition to the Supreme Court of the United States. Word from the court should come early next year.

True, no death penalty appeal in today's America is final until the hooded executioner trips the switch. The fine points of the law of capital punishment are constantly shifting.

Now, though, legal experts are saying what they have never said before: that the time is close, the matter has matured.

This is Bundy's last stand.

★ ★ ★

At 4:48 p.m. Tuesday, Nov. 15 — 10 years and 280 days after Kimberly Diane Leach disappeared from school on a rainy morning in Lake City, Florida — an exhausted lawyer delivered the 62-page petition to the clerk of the court in the District of Columbia.

Musty with tradition, the pleading began: "Petitioner Theodore Robert Bundy respectfully prays that a writ of certiorari . . ."

The nine esteemed justices are under no obligation to consider Bundy's pleas, which have already been denied by judges in Orlando, Tallahassee and Atlanta.

Should the court respond in a single word — "Denied" — the governor of Florida will be free to sign a death warrant. Bundy's fourth, but the

Turn to **BUNDY** / *30*

■ **For nearly 10 years, the nation's most notorious Death Row inmate, Theodore Robert Bundy, has lived in the shadow of the electric chair. Suspected killer of 36 young women, his complicated appeals seem to have dragged on forever. Now his time may be running out. The clogged and inefficient machinery of America's death penalty is on the verge of an epic execution.**

Bad genes uncovered by doctor

Grandpa 'like madman'

BUNDY / *from 1A*

first that is likely to matter.

Then the convicted killer of three, suspected killer of 36, will be left with nothing but moves of desperation, playing chess with nothing but pawns.

Bundy's slow walk toward the electric chair began July 31, 1979, when he was sentenced to die for the murders of two Florida State University women, bludgeoned in their sleep at the Chi Omega sorority house.

On Feb. 12, 1980, Bundy was again sentenced to die, for the Lake City kidnap-murder.

Appeals in the two cases have crisscrossed through the courts in alternating spurts. Now the Chi Omega case is stalled; the Lake City case is advancing.

In a last, bold attempt to save himself, Bundy permitted his lawyers to make the one argument he swore he would never allow: that he is not of sound mind, and that his mental illness should have rendered him incompetent to stand trial.

It wasn't an easy decision for the arrogant Bundy. "Ted would rather die than admit to any weakness of mind," says Ann Rule, an old friend.

Or as Bundy once put it: "It really tears me apart. . . . I don't want to lay myself out for the whole world to see."

Convinced that it was his only hope, Bundy submitted to the psychiatric analysis of Dr. Dorothy Lewis, a professor at Yale and New York University. In the most extensive examination ever of Prisoner 069063, Lewis interviewed Bundy, his friends and his family.

She produced a psychological portrait largely unknown when Bundy, now 42, stood trial nine years ago. Lewis's diagnosis: Bundy has been severely mentally ill since 1967.

Even as a toddler, Lewis discovered, Bundy's behavior was bizarre. At 3, the future murderer carried butcher knives to his aunt's bedroom.

The impressionable boy, Lewis learned, watched his violent grandfather twirl cats by the tail. Grandpa kept a cache of pornography in the greenhouse, which little Ted pored over in secret.

The doctor found other bad genes. Ted's grandma required electroshock therapy.

Added up, Lewis concluded that Theodore Robert Bundy was too disturbed to meet the legal standard for trial. His manic-depressive mood swings left him out of touch with reality.

In the words of Mike Minerva, one of the 21 lawyers who tried and failed to save the life of Ted Bundy: "I don't think he understood the significance of the evidence against him."

If that opinion could be proved, Bundy should have been locked up in a mental hospital instead of standing trial. According to the laws of the United States, society may not execute crazy people.

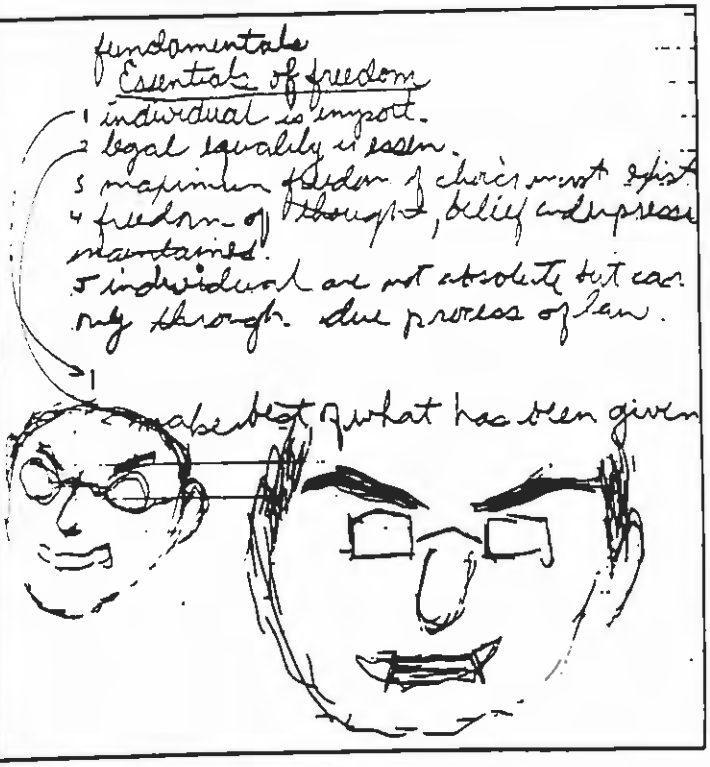
In theory. In fact, the line between depravity and insanity is difficult to define.

Florida prosecutors insist that Bundy never crossed that line. They contend that Bundy is diabolically manipulative. Judges have been inclined to agree.

When a federal appellate court ordered U.S. District Judge G. Kendall Sharp to assess the findings of Dr. Lewis, he did so grudgingly. Entering a courtroom in Orlando, a television reporter asked the judge if the hearing would be a waste of time.

"Absolutely," the judge replied.

Says Florida's lead attorney on the case, Assistant Attorney General Mark Menser: "This thing has been a fraud from the beginning."



Doodles from a college notebook of Ted Bundy's. He once told investigators, 'Sometimes I feel like a vampire.'

"The word is that Ted will go early next year — late winter or spring," says Michael Radelet, a University of Florida sociologist and an authority on capital punishment.

The common wisdom among death penalty experts is that the Supreme Court will deny Bundy's petition, and Bob Martinez, the signer of 61 death warrants in 24 months as Florida's governor, will promptly order Bundy's death.

At that point, chances are slim the courts would intercede. Bundy's lawyers acknowledge they've already made their best arguments.

What's more, even the courts cannot be completely immune to the gut-wrenching hatred Bundy inspires. "I'll buckle up when Bundy does," read a popular bumper sticker during the debate over mandatory seat belts.

Michael Tryson, a Miami civil lawyer, proclaims his feelings on the personalized license plate of his 1984 Mazda: FRY TED. Bureaucratic censors in Tallahassee — the same people who banned 4-PLAY as offensive — found Tryson's message appropriate.

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From coast to coast, the name Ted Bundy is synonymous with ruthless, unapologetic evil, and the popular response is to demand the evil be purged.

Executions are as American as the Mayflower's Pilgrim Fathers, one of whom was hanged in 1630. Through the centuries, the nation has clamored for executions and flocked to see them. More than 20,000 people crowded into Owensboro, Ky., to see the last public execution in 1936.

At times, the equipment doesn't work right. Electrocuted inmate Fred Van Wormer started moving on the autopsy table in 1903 and had to be hauled back to the New York death house and strapped back into the chair.

At times, the system doesn't work right. A recent study in the Stanford Law Review documented more than 20 executions of innocent people.

But public zeal for the death penalty flourishes. More than seven in 10 Americans say they support capital punishment.

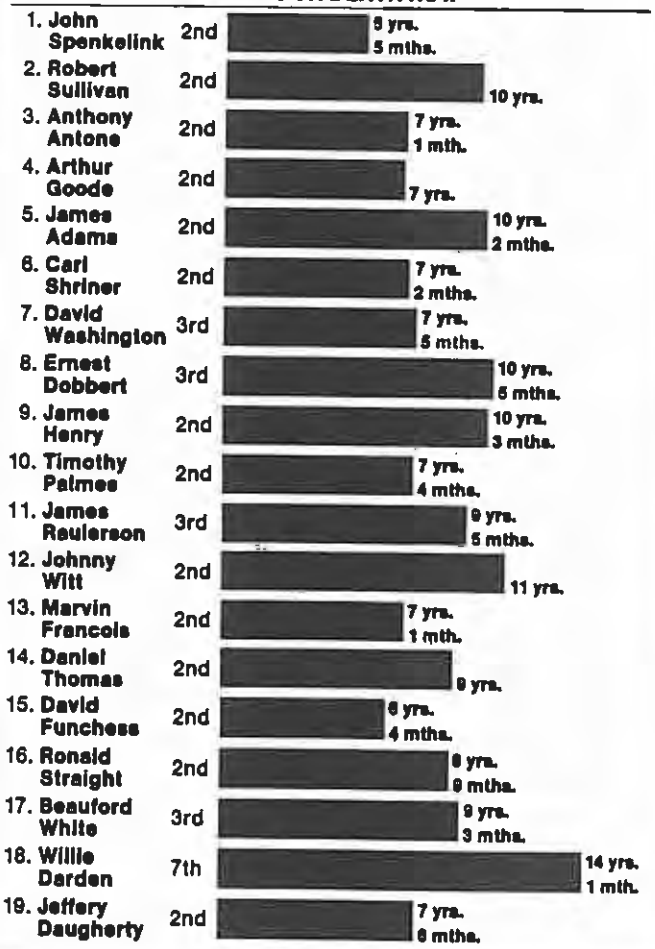
Only one thing has changed: Typical executions no longer draw much attention. They have slipped into the inside pages of America's consciousness.

Bundy is the exception. His infamy assures that his execution would be the most important event for capital punishment since Utah's Gary Gilmore demanded a speedy send-off in 1977. Gilmore died in a media circus and a hail of bullets, thus ending the nation's 10-year moratorium on official killings.

Bundy's 1979 trial for the sorority house murders of Lisa Levy and Margaret Bowman was the most publicized since Charles Manson's.

FROM DEATH ROW TO DEATH

Average stay on Death Row for the 19 men executed in Florida since 1979: eight and a half years. Ted Bundy's wait: nine years, four months — so far. Fifty-five men have been there longer than Bundy.



Live cameras in the courtroo caught it all.

Trial Judge Edward Cowart not that Bundy had "a mystique of so: . . . a name identification in Flori at least equal to that of Florid most notable personages." One p ranked the law school dropout s ond to the governor for name rec nition.

Since then, five books and u counted articles have nurtured t legend. NBC's made-for-televisi movie ran two nights of prime tim Mark Harmon — at that time P ple magazine's "Sexiest Man Aliv — played the starring role.

"I still get calls and letters fr young women who want to sell th possessions and move to Florida be near Ted," says Bundy's frie Ann Rule, author of *The Stran Beside Me.* "I have to tell the 'You're not in love with Ted Bunc you're in love with Mark Harmon.

"When I first knew Ted," R says, "he was socially inept. I walked around with his head lo ered and his shoulders hunched.

"As his cases wore on and he b came more famous, he created t role of the dashing young lawyer. was as if infamy became him, and blossomed under it."

When the day comes, a pastu across the road from the dea house at Florida State Prison v bloom with the satellite dishes television stations from Miami, t site of Bundy's most-publicized tri to Seattle, the city where his od sey of death began.

Limousines will be dispatched the homes of Bundy's friends a chroniclers to ferry them to t morning news shows.

"His celebrity status means th one is going to draw an awful lot

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attention," says Richard Larsen, associate editor of The Seattle Times and author of *Bundy: The Deliberate Stranger.*

This obsession with Bundy obscures the fact that, fundamentally, today's death penalty is a failure of execution: costly, slow and inefficient.

In Florida alone, there are 55 prisoners on Death Row who have been there longer than Ted Bundy. Since 1972, only 3 percent of America's death sentences have been fulfilled.

Conservative estimates put the cost of the average execution in Florida six times higher than life imprisonment, because of complex appellate battles.

Available estimates put the price tag for prosecutors, investigators and defense attorneys in Bundy's case in excess of $5 million. For one-tenth that amount, he could be locked up for life.

To much of the public, though, an execution would be worth it, proof that the death penalty *can* work.

His attorneys know what they're up against. Says Polly Nelson, "The public perception is clearly that if anyone should be executed, it's Ted Bundy."

He stalked attractive young women, using a badge or a fake cast or just a smile to appear harmless. He bludgeoned them senseless, raped and strangled them.

In all but a few cases, that was the Bundy *modus operandi.*

Circumstantial evidence too compelling to ignore linked him to unsolved murders in Washington, Oregon, Utah and Colorado. Bundy once hinted to police that his toll was more than 100, probably an exaggeration — but who notices when a runaway vanishes?

Prosecutors depicted him as a deceptive genius, but in hindsight there were ample reasons to suspect something was very wrong with Ted Bundy. His savage harvest is testimony to the susceptibility of the innocent to random, methodical serial killers.

Neighbors fail to notice. Friends don't want to suspect.

Thirty-three young men and boys went to the home of Illinois businessman John Wayne Gacy, and none returned. But no one acted until the odor of death became unmistakable. Juan Corona buried 25 farm workers in a California orchard before anyone noticed.

Bundy once spoke of his talent for apparent normalcy. "It didn't take much effort at all."

The findings of Dr. Dorothy Lewis add a new dimension to the already chilling glimpse of the serial killer.

Ted was born in Burlington, Vt., on Nov. 24, 1946, to a department store clerk named Louise Cowell, at a home for unwed mothers known informally as Lizzie Lund's Home for Naughty Ladies.

Louise never said much about the boy's father, identifying him only as a big-talking sailor home from the war. He has never been traced.

Mother and child lived with Louise's parents in a middle-class neighborhood of Philadelphia. Bundy remembers a happy existence. "I can't think of anything significant in my own background, traumatizing, that helps me understand," he once said.

Older relatives remember it differently.

Grandpa Sam Cowell, a landscape gardener, was "an extremely violent and frightening individual," Lewis discovered.

When one of his workmen dug up the wrong shrub, Sam Cowell would go into a rage. His own brothers feared him, refused to invite him to the family Christmas party. They even "wanted to kill him," said his sister, Ginny Bristoll.

"I always thought he was crazy," she told the psychiatrist.

One morning, Ted's Aunt Julia slept until 9 — unforgivable in the grandfather's eyes. He dragged her out of bed and threw her down the stairs.

Sam Cowell "acted like a madman." He liked to kick the dog and swing cats by the tail.

Then there was the matter of the toddler's knives.

On "several occasions," said Aunt Julia, 3-year-old Ted collected butcher knives from the kitchen, carried them to the bedroom, lifted the covers and put them next to her. Then he "stood there" with a "glint in his eye."

Grandma Eleanor was often depressed, refusing to leave the house for long periods, bursting into uncontrollable harangues. The family repeatedly checked her into a psychiatric hospital, where she was treated with electric shocks.

A cousin of Ted's told the doctor that he used to sneak with Ted into the greenhouse. There Ted, still a preschooler, studied Sam's large collection of pornography.

The family decided something must be done. "We felt Louise had to be rescued," Ginny Bristoll told Lewis.

So one day, Louise packed up her 4-year-old son and moved to Tacoma, Wash., to make a fresh start.

Years later, Bundy invented a story, saying his family told him Sam was his father and Louise his older sister. He told investigators that his grandfather was a good man and a role model.

Lewis, the psychiatrist, is not surprised that Bundy has no recollection of his grandfather's oppressive violence. "When a youngster has been horribly traumatized so that he cannot tolerate what he has witnessed . . . he tends to totally repress," she says.

In Tacoma, Louise Cowell met John Culpepper Bundy at a Methodist church social. They were married and Johnnie Bundy went to work as a cook at the VA hospital. They didn't have much money — which Ted resented increasingly.

At school, Ted was a good student, not brilliant. Boisterous and prone to fights on the playground, he was shy and awkward about reading in front of the class.

Signs of his fragmented personality emerged gradually. By high school he showed — to the perfect vision of hindsight — most of the pieces that would make up the infamous killer.

There was the outward face of normalcy: Boy Scout, vice president of the Methodist Youth Fellowship.

There was the veiled contempt for authority. He began stealing the things Johnnie Bundy was too poor to buy — ski equipment, ski passes. He was caught trying to steal a car but was released with a warning.

There was the sexual maladjustment. Bundy masturbated compulsively, sometimes in closets at school. According to one police investigator, Bundy's classmates once caught him in the act and humiliated him.

There was the violence. Once, he came up behind another boy and hit him over the head with a stick.

At college, it all got worse. Even as he earned A's in intensive Chinese, he rifled lockers and stole from inebriated customers on the job at the local yacht club. He shoplifted nice things for his apartment — even a five-foot potted tree. He wore wigs to change his appearance.

And at night, Ted Bundy donned dark clothes and crept around the

Turn to **BUNDY** / *31A*

(continued)
The Miami Herald
Sunday, December 11, 1988
30A

BILL FRAKES / Miami Herald St

After 1979 jury recommends death for the Chi Omega murders, Bundy does 'Laurel and Hardy imitation.'

Killer tries incompetence defense

BUNDY / *from 30A*

neighborhood peeping through windows at women undressing. He devoured pornography.

"Pornography is one person's pleasure, another person's vice or downfall," he once told Pensacola police detective Norman Chapman.

"It was one thing that caused him a lot of trouble," Chapman says.

In several near-confessions, Bundy revealed to psychiatrists, investigators and biographers how his fantasies crept off the page and took the shape of women around him — rich, beautiful young women, the kind who were cheerleaders and majorettes. He wanted to possess them; only a few thin strands of guilt held him back.

And then:

"I made myself the way I was," he has said. "I mean bit by bit and step by step and day by day. I don't know why. I don't know what spurred me to do it.

"There was a time, way back, when I felt deep, deep guilt about even the very thought of harming someone. And yet for some reason I had a desire to condition that out of me. And I did, day by day by day. Conditioned it out on an abstract level.

"And when it got down to actual cases . . . I conditioned that out of myself, too."

"Ted Bundy seems to be a perfect example of the charming, intellectual, charismatic personality that epitomizes many serial killers," Ronald Holmes and James DeBurger write in their book *Serial Murder.*

People praised and rewarded the "normal" Bundy who made a splash as a Republican Party worker, impressive enough to merit a glowing law school recommendation from Washington Gov. Dan Evans.

Somehow they glossed over the thieving, the skulking, the joy he took in wearing disguises and jumping out of bushes to frighten his girlfriends.

Ann Rule worked Tuesday and Sunday nights alongside Bundy answering a suicide hot line in Seattle. Late at night, after work, he would walk her to her car and warn, "Be sure your door is locked, so nothing bad happens."

"I felt so dumb for so long," says Rule, a former police officer. "Why couldn't I see?

"Ted has so much control. His whole life was compartmentalized. The Crisis Center people didn't know the Republican people, and the Republicans didn't know his family, and his family didn't know the people he went sailing with, and so forth.

"Only later did I learn that after I would leave the Crisis Center, he would turn the phones off and go to sleep. Imagine those poor suicidal people calling and getting no answer."

"He was such a chameleon," Rule says. "He knew instinctively how to give back to people exactly what they wanted to perceive."

Press and prosecutors perceived him as a brilliant criminal — even though his personal gasoline credit card charges put him at the scene of a number of murders.

Colorado prosecutors put together enough clues to indict Bundy for the murder of a nurse at a ski lodge, but Bundy broke out of jail. In Glenwood Springs, shortly before his escape, he asked a lawyer which state would be most likely to execute a killer.

"Florida," came the answer.

That is where Bundy went.

He believed that he had "cured himself" of his "problem." But within days of reaching Tallahassee, he compulsively began shoplifting again. "It was ludicrous to risk things for a backpack full of sardines," he admitted.

He began drinking — another aspect of his "problem." On Saturday, Jan. 14, 1978, Bundy drank bourbon at Sherrod's, a bar next to the drab brick rectangle of the Chi Omega house. Patrons noticed the "weird-looking" man.

Sometime before 3 a.m. Sunday, he crept into the sorority house carrying a heavy oak branch covered with bark. He went from room to room, bludgeoning, raping and strangling. Two women died; two women survived. A bite mark on one victim's buttocks later incriminated Bundy.

Several blocks away, another woman was attacked. She barely survived.

Stephen Michaud and Hugh Aynesworth, authors of *The Only Living Witness,* speculate that Bundy's insanity had finally consumed him wholly. Still, the killer held himself together for another month — long enough to rape, mutilate and strangle Kimberly Leach and dump her body in a hog shed.

He was captured by a Pensacola police officer who fired twice at the fleeing fugitive.

"I wish those policeman's bullets had hit their mark as I ran blindly down the street," he later said. "I didn't want anymore chances. I can't play the part."

Bundy's behavior was blatantly self-destructive, his lawyers maintain. They argue that he repeatedly sabotaged his own defense, most notably when he wrecked a deal to save his life.

Despite the noose of evidence against him, Bundy's public defenders struck a secret bargain with the prosecution. For pleading guilty, Bundy would get three consecutive life sentences. He wouldn't see the parole board until he was 107.

Millard Farmer, a honey-voiced anti-death-penalty lawyer and one of the few people Bundy remotely trusted, flew from Atlanta to persuade the defendant.

The prospect of confessing made Bundy squeamish, but Farmer was convincing. At last Bundy agreed.

But in his cell the night before the formal hearing, Bundy scrawled a motion of his own — to fire his lawyers. In the courtroom, he held his motion in one hand and the plea papers in the other.

For an anguished moment, Bundy teetered. Then he stood and denounced his lawyers. And sealed his fate.

"I don't know why it happened," Farmer drawls. "Ted appears so rational, intelligent, capable, competent and normal. We want to see green slime or whatever coming

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from a person's eyes and mouth before we accept mental illness," he says.

"I realize now Ted's compulsive need to harm people extends to harming himself. When I think of things I've done wrong, of my failures in life, I think of my inability to save him from himself."

Bundy's appellate attorneys contend there are other good reasons for the Supreme Court to find that their client was incompetent.

During the Chi Omega trial, he abruptly seized a folder from one of his lawyers and began cross-examining a police officer about the gory details of the murder scene. He seemed monstrous and cold, several jurors said later.

During the Leach trial, Bundy read People magazine hidden in a file folder, popped pills and swigged vodka smuggled to him by his fiancee, Carole Boone. Rather than give reasons why the jury should spare his life, Bundy called his fiancee to the witness stand and staged a mock wedding.

Nothing crazy about that, says the state of Florida.

Dr. Umesh Mahtre, a small-town psychiatrist who has failed the examination for certification in forensic psychiatry three times, testified for the state.

"I have sat here just amazed that people are so upset that Mr. Bundy got married in the courtroom," Mahtre said. "I have seen people dropping from parachutes, 10,000 feet from the air, marrying on the way down."

Prosecutors point out that Bundy plotted strategy, argued motions, questioned witnesses. Surely, they say, that proves he could understand the case against him.

Bundy's courtroom conduct may have been simply a matter of pure ego, a joy ride.

"I screwed my life over, but still I've always wanted to be an attorney," he once said. "I want to show that a guy with a year and a half of law school can stand up there and let the air out of [the prosecutor's] tires. That I can . . . run these people ragged. That I'm not a fiend, necessarily."

If Theodore Robert Bundy is executed next year, the news will not be that it took so long, but that it came so quickly.

Granted, Bundy's nine-plus years on Death Row seem like an eternity. But in today's wretchedly backlogged system of capital punishment, Bundy's stay is typical, utterly routine.

Nearly half the 19 men executed in Florida since 1979 waited nine years or more. Indeed, in Florida, a 10th anniversary on Death Row is more than twice as common as an execution.

Seven days ago, Bundy's neighbor, Howard Douglas, became the first inmate in America to mark 15 years on Death Row. But he won't be the last. In Florida alone, more than a dozen men have been on Death Row more than 13 years.

No state with the death penalty is immune. Nationwide, the Death Row population is more than 2,100. With judges condemning 300 more each year, America could have an execution a day for 32 years. Executions so far in 1988: 10.

The sheer size of the Bundy court record makes his journey through the system remarkable. It is one of the largest in Florida criminal history — more than 28,000 pages, or roughly as long as the Encyclopaedia Britannica.

Appellate judges are expected to scrutinize the record as part of their deliberations. The Florida Supreme Court needed five years.

Although the prosecutors don't accept the contentions of the defense, they acknowledge that Bundy's case has gone as smoothly as possible. "So far," says Assistant Attorney General Carolyn Snurkowski, "we have not had a problem with delaying tactics."

The 62-page petition that attorney Polly Nelson delivered to the U.S. Supreme Court 26 days ago came from the promi-

SERIAL KILLERS

If Ted Bundy goes to the electric chair next year, as many death penalty experts predict, he will be the first notorious "serial killer" executed since the term was coined some 15 years ago.

Juan Corona
State: California
Suspected victims: 25
Sentence: Life (currently eligible for parole)

David Berkowitz
"Son of Sam"
State: New York
Suspected victims: 6
Sentence: Life

John Wayne Gacy
State: Illinois
Suspected victims: 33
Sentence: Death (awaiting execution)

Angelo Buono
"Hillside Strangler"
State: California
Suspected victims: 23
Sentence: Life

William Bonin
"Freeway Killer"
State: California
Suspected victims: 21
Sentence: Death (awaiting execution)

Wayne Williams
State: Georgia
Suspected victims: 28
Sentence: Life

Christopher Wilder
Various states
Suspected victims: 8
Killed in shoot-out with police

Ted Bundy
Various states
Suspected victims: 36
Sentence: Death (awaiting execution)

Unknown
"The Green River Killer"
State: Washington, possibly elsewhere
Suspected victims: 45+
At large

nent Washington l
firm of Wilmer, Cutler and Pick
ing.

The firm picked up the case without fee — in 1986, unaw that its new client was Americ most notorious condemned man.

"I had no idea Bundy was suc phenomenon," Nelson says.

She learned quickly. Defendi Ted Bundy has consumed half h working hours for almost thr years, Nelson says. She is one of f lawyers at the firm who ha worked on the appeal.

Nelson hand-delivered the pe tion 12 minutes before the design ed deadline. That was the day word processor broke down.

"You made it," said Coleman W liams, an assistant clerk of the preme Court. Gov. Martinez's off had been calling all day, hoping petition would be too late.

Bundy's appeal hammered three issues: competency, hypnc and adequacy of trial counsel.

The legal test of competency whether a defendant fully comp hends the case against him and able to assist in his defense. Six p chiatrists — three of whom ha never spoken to him — have tes fied about Bundy, and they ca agree.

"I hate to admit this," said Ut prison doctor Al Carlisle, "but T manipulates even me."

The petition asks the Supre Court to reverse the opinion of U District Judge Sharp, who concl ed that Bundy "is probably the mc competent serial killer in the cou try . . . a diabolical genius."

Key witnesses against Bun were hypnotized to "refresh" th memories, a practice more a more courts find objectionable. T Florida Supreme Court ruled th hypnotism had no place in a crimir proceeding — but made a narr exception in Bundy's case, saying harm had been done.

Bundy's lawyers want the justic to grant a new trial, excluding t hypnotized witnesses.

The last issue revives an old cla

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that never took off — that Bundy's trial lawyers didn't do their jobs.

Odds are that the Supreme Court will say no to all three. Last term, the court received 5,268 petitions. It accepted 167. It decided 139.

When the hour draws near, along with the flood of reporters and cameras and satellite dishes and foes and advocates of the death penalty and assorted curiosity seekers will come a few weary detectives from places like Seattle, Corvallis, Salt Lake City, Aspen.

They want to tie up the loose ends. "To put the families at ease," says C. Garth Beckstead, a Utah homicide investigator.

It's doubtful they will get anything.

"Sitting there in a cell," Bundy once said, "I could convince myself that I was not guilty of anything."

He spoke of confession: "Walking right up to the edge" is "a thrill," but "I can't do it. I haven't allowed myself to choke."

To Richard Larsen, Bundy biographer, that would be the final tragedy — for Bundy to die in silence. "So much could be learned from Ted if he would open up and help us understand.

"We don't learn from these people. We simply get rid of them, dispose of them, then hunch our shoulders and wait for the next one."

But maybe Bundy already explained it all.

"You gotta understand," he once said. "I'm a cold-blooded son of a bitch."

THEODORE ROBERT BUNDY'S DAYS IN COURT

Theodore Robert Bundy's two-front battle to escape execution has generated 19 appeals and requests for reviews or new hearings, one clemency hearing, three death warrants and eight requests for stays of execution.

	CHI OMEGA CASE Two Florida State University students killed Jan. 15, 1978					KIMBERLY LEACH CASE 12-year-old Lake City girl killed Feb. 9, 1978				
DATE	Appeals, etc.	Clemency hearings	Death warrants	Requests for stays	EXPLANATION	Appeals, etc.	Clemency hearings	Death warrants	Requests for stays	EXPLANATION
1979										
July 25					Convicted.					
July 31					Sentenced to death.					
Sept. 4	X				Asks trial judge for a new trial. (Denied)					
Sept. 26	X				Mandatory appeal to Fla. Supreme Court.					
1980										
Feb. 7										Convicted.
Feb. 12										Sentenced to death.
Feb. 26						X				Asks trial judge for a new trial. (Denied)
April 22						X				Mandatory appeal to Fla. Supreme Court.
1981, 1982, 1983										
No activity.										
1984										
June 21					Fla. Supreme Court upholds conviction.					
Sept. 24	X				Fla. Supreme Court denies request for rehearing.					

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1985										
May 9										Fla. Supreme Court upholds conviction.
July 11						X				Fla. Supreme Court denies request for rehearinc
Dec. 18		X			Clemency hearing held. (Clemency denied)					
1986										
Jan. 15	X				Asks U.S. Supreme Court for a review.					
Feb. 5			X		Death warrant signed.					
Feb. 13				X	Asks U.S. Supreme Court for stay. (Denied)					
Feb. 21				X	Asks Fla. Supreme Court for stay. (Denied)					
Feb. 25				X	Asks U.S. Supreme Court for stay. (Granted)					
March 4					Death warrant expires.					
May 5					U.S. Supreme Court denies request for review.					
May 22			X		Death warrant signed.	X				Asks U.S. Supreme Court for a review.
June 23	X				Asks trial judge to hear new appeals. (Denied)					
June 25	X				Appeals to Fla. Supreme Court. (Denied)					
June 28				X	Asks trial judge for stay. (Denied)					
June 30	X				Appeals to Fla. Supreme Court. (Denied)					
July 1	X X			X	Asks U.S. District Court for a writ of habeas corpus. (Denied) Asks U.S. Circuit Court of Appeals for a stay to review U.S. District Court ruling. (Granted)					
July 2					Death warrant expires.					
Oct. 14										U.S. Supreme Court denies request for review.
Oct. 21								X		Death warrant signed.
Nov. 7									X	Asks trial judge for stay. (Denied)
Nov. 11									X	Asks U.S. Circuit Court of Appeals for stay. (Denied)
Nov. 14						X X				Asks trial court to hear new appeals. (Denied) Appeals to Fla. Supreme Court. (Denied)
Nov. 17						X X			X	Asks U.S. District Court for a writ of habeas corpus. (Denied) Asks Circuit Court of Appeals f a stay to review U.S. District Court's decision. (Granted)
Nov. 18										Death warrant expires.
1987										
April 2										U.S. Circuit Court of Appeals orders hearing on Bundy's competence to stand trial.
April 27					U.S. Circuit Court of Appeals orders hearing on Bundy's competence to stand trial.					
Oct. 22										Hearing begins in U.S. District Court
Dec. 17						X				Incompetence claim denied. Asks Circuit Court Appeals to review this decision.
1988										
July 7										Circuit Court of Appeals affirms decision.
Nov. 15						X				Asks U.S. Supreme Court to hear appeals.
TOTALS	9	1	2	5		10	0	1	3	