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Sent: Friday, March 09, 2018 6:47 PM
To: Carson, Sharon
Cc: Chroniak, Deborah
Subject: SB 593
Attachments: MR SB 593.pdf

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Senator Carson:

I submit for your consideration a legal memorandum regarding the potential retroactive application of SB 593, a bill changing the penalty for capital murder from the death penalty to life imprisonment without the possibility of parole. I understand that the Judiciary Committee will be considering this bill on Monday, March 12, 2018.

I hope this memorandum is helpful to the Committee. If I can provide any additional information, please let me know.

Thank you.

Gordon

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STATE OF NEW HAMPSHIRE
DEPARTMENT OF JUSTICE

MEMORANDUM

To: Honorable Sharon Carson
Chair, Judiciary Committee
New Hampshire Senate

From: Gordon J. MacDonald, Attorney General

Re: Senate Bill 593 (a bill changing the penalty for capital murder to life imprisonment without the possibility for parole)

Date: March 12, 2018

Issue

SB 593 would change the penalty for capital murder to life without the possibility of parole for anyone convicted of that crime on or after January 1, 2019. Can the General Court repeal the death penalty without disturbing death sentences that have already been imposed?

Short Answer

Probably not. Although the New Hampshire Supreme Court has not addressed this question, courts in other states that have done so, or have considered related death-penalty-repeal issues, have concluded that a death penalty repeal signals that society has determined the death penalty no longer comports with contemporary standards of decency, is no longer necessary, and no longer serves any legitimate penological purpose, *i.e.*, that it constitutes cruel and unusual punishment, and therefore, that a complete and immediate prohibition against executions is required even if the repeal was prospective. Moreover, no state which has abolished its death penalty has subsequently executed a death-sentenced inmate. Accordingly, there is good cause to conclude that prospective repeal of New Hampshire's death penalty will result in its abolition.

While this memo provides some guidance as to the likely effect of a prospective repeal on previously imposed death sentences, only the New Hampshire Supreme Court can give a definitive declaration of that effect. If it so chooses, the legislature has the authority to request such an opinion from that Court pursuant to Part II, Article 74 of the New Hampshire Constitution.

Analysis

Part 1, Article 33 of the New Hampshire Constitution and the Eighth Amendment to the Constitution of the United States prohibit the imposition of criminal sentences that are cruel and

unusual. While Part 1, Article 33 may be more protective than the Eighth Amendment, it cannot be less. To determine whether the death penalty violates the Eight Amendment, the Court conducts the following analysis: whether evolving standards of decency that mark the progress of a maturing society support the conclusion that the death penalty violates the constitution.

In *State v. Michael Addison, 165 N.H. 381 (2013)* the New Hampshire Supreme Court applied that analysis to consider the facial validity of New Hampshire's death penalty. The Court focused on the legislative history of the sentence. Noting the multiple legislative amendments that had been made to the sentence over time and observing the presumptive validity of a punishment selected by a democratically elected legislature, the Court rejected the argument that the death penalty violated New Hampshire Constitution. *Id.* at 570. However, if SB 593 were to pass, that would likely be interpreted as an indication that societal standards of decency have changed.

Thirty other states currently have the death penalty, four of which have nonetheless halted executions. *See* https://deathpenaltyinfo.org/states-and-without-death-penalty. The remaining 19 states and the District of Columbia no longer have a death penalty. In Massachusetts, New York, and the District of Columbia, courts invalidated the death penalty statutes, which effectively banned future executions until the statutes were amended, which did not occur. In two states—North Dakota and West Virginia—the death penalty was repealed by legislation that expressly stated it was retroactive. In six states—Hawaii, Illinois, Iowa, Maryland, Minnesota, and New Jersey—the death sentences of the inmates on death row were commuted by the executive branch, either before or after passage of legislature repealing the death penalty.

The legislatures in only two states—Connecticut and New Mexico—have expressly stated that their complete repeals of the death penalty were prospective. The New Mexico courts have not yet addressed whether the death penalty may lawfully be applied to persons sentenced to death before the effective date of the repeal. However, the Connecticut Supreme Court has done so, holding that the Connecticut Constitution no longer permits the execution of individuals sentenced to death for crimes committed prior to the enactment of prospective repeal.

In reaching that conclusion, the Connecticut Supreme Court framed the question as follows: whether the state's prospective repeal of its capital felony statutes rendered its continued imposition of the death penalty unconstitutionally excessive and disproportionate punishment. *State v. Santiago*, 122 A.3d 1 (Conn. 2015). The court looked at the five objective indicia of society's evolving standards of decency identified by the United States Supreme Court, which include: (1) the historical development of the punishment at issue; (2) legislative enactments; (3) the current practice of prosecutors and sentencing juries; (4) the laws and practices of other jurisdictions; and (5) the opinions and recommendations of professional associations.

In considering the legislative enactments factor, which is the relevant consideration here, the court observed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by a legislative body. It concluded that the prospective repeal of the death penalty by the state's elected representatives signaled they had "determined that the machinery of death [was] irreparable or, at the least, unbecoming to a civilized modern state,"

and "thus provide[d] strong support for the conclusion that capital punishment no longer comport[ed] with contemporary standards of decency and, therefore, constitute[d] cruel and unusual punishment." *Id.* at 40. The Court also concluded that the legislative history of the repeal "strongly suggest[ed] that both of the elected branches were motivated in no small part by a principled belief that state sanctioned executions [were] no longer a necessary or appropriate form of punishment, even for the most heinous crimes." *Id.* at 48. Following the repeal of the death penalty, "any deterrent value the death penalty may have had no longer existe[d]," *id.* at 57, and that it "no longer serve[d] any legitimate penological purpose," *id.* at 73. It thus concluded that the death penalty could no longer be imposed or carried out because it "fail[ed] to comport with [the state's] abiding freedom from cruel and unusual punishment." *Id.* at 85.

Several other states have also held that a partial prospective repeal of the death penalty to exclude certain persons from its reach signaled that executing those persons no longer conformed with contemporary standards of decency, *i.e.*, that it constituted cruel and unusual punishment, and that therefore, a complete and immediate prohibition against executions of those persons was required. *See, e.g., Fleming v. Zant*, 386 S.E. 2d 339, 342 (Ga. 1989) (passage of statute that prohibited executing mentally disabled persons reflected a decision that execution constituted cruel and unusual punishment); *Van Tran v. State*, 66 S.W.3d 790, 805 (Tenn. 2001) (same); *see also, e.g., State v. Bey*, 548 A.2d 846, 876-77 (N.J. 1988) (giving retroactive effect to a statute prospectively repealing the death penalty for crimes committed by minors in part because "notions of fundamental fairness … demand[ed] retroactive application of the juvenile-offender exemption").

Conclusion

The foregoing analysis demonstrates that legislative action regarding the death penalty is an important benchmark in the judicial consideration of whether the penalty is lawful. Repeal of the penalty, whether or not prospective, may be interpreted by the New Hampshire Supreme Court as a signal that the people of New Hampshire have determined the death penalty no longer comports with contemporary standards of decency, is no longer necessary, and no longer serves any legitimate penological purpose, *i.e.*, that it constitutes cruel and unusual punishment.