

Testimony of
Quinnipiac University School of Law Civil Justice Clinic

In Support of Raised Bill No. 280

Judiciary Committee
March 14, 2012

Good afternoon distinguished committee members. My name is Christine Gertsch and I am a second-year law student at Quinnipiac University School of Law in Hamden. I am also a student in the Law School's Civil Justice Clinic, which strongly supports Raised Bill No. 280, An Act Revising the Penalty for Capital Felonies.

The Clinic's testimony will address a legal argument that was made repeatedly at hearings before this Committee in both 2009 and 2011—that a prospective-only death penalty will be interpreted by the Connecticut Supreme Court to retroactively nullify existing death sentences.¹ We will explain why this argument is most likely wrong, as demonstrated by our own Connecticut Supreme Court's decision from last November, in which it upheld the constitutionality of the death penalty and strongly signaled the death's penalty continued constitutionality in light of prospective-only repeal. And if the Connecticut Supreme Court's November decision were not enough, we now have not one but two decisions from the Supreme Court of New Mexico—the only court to have directly addressed this critical issue—which refused to give retroactive effect to New Mexico's 2009 prospective repeal. Those on New Mexico's death row remain on death row despite New Mexico's prospective repeal of the death penalty. In this testimony, we will show why the result would likely be no different for prospective repeal in Connecticut.

Before we turn to the legal case for prospective repeal, we want to briefly address its merits from a moral standpoint. While others in attendance, including the families of murder victims, church groups, and members of the ACLU, Amnesty International, and other human rights organizations, will make a far more eloquent case than we will, we wish to say this: the moral case for the death penalty is thin at best and, in our view, far outweighed by the festival of cruelty it incites and the arbitrariness it entails. As a result, support for the death penalty is receding—everywhere around us. Although Connecticut shares its borders with Rhode Island, Massachusetts, and New York, Connecticut is a virtual island when it comes to the death penalty in the northeast. As Connecticut Supreme Court Justice Flemming Norcott asked rhetorically in a dissenting opinion last November, how long must “we, the people of Connecticut, continue down this increasingly lonesome road?”² By repealing the death penalty, you will be doing something that is right—and long overdue.

But we are here today to discuss the law. While the Civil Justice Clinic supports complete repeal, we want to address the legal merits of a prospective-only repeal; that is, a bill that leaves in place the sentences of those currently on death row, but abolishes the death penalty going forward.

Prospective repeal sounds like a reasonable compromise—it preserves the finality interests of victims and their families, while allowing Connecticut courts to impose a maximum sentence of

life in prison without the possibility of parole for future offenders. But we heard from various people at hearings last spring and in 2009 that a prospective-only death penalty is not a reasonable compromise because the Connecticut Supreme Court will use that repeal to strike down the death sentences of those currently on death row on constitutional grounds.³ Specifically, the Chief State's Attorney, Kevin Kane, told you that, if you repeal the death penalty prospectively, he has no good constitutional argument for why the Court should not completely disregard your words and extend your repeal to existing death sentences.⁴ Attorney Temmy Pieszak, the Chief of Habeas Corpus Services for the Office of the Chief Public Defender, on the other hand, said with "95 percent" certainty, that the Connecticut Supreme Court would respect a prospective-only repeal and not reduce the death sentences of those currently on death row.⁵ Several legal scholars came down some place in the middle.

What is striking is that, during that entire back and forth debate, no one cited a single case—either in Connecticut or elsewhere—that squarely addressed the critical issue of what happens to a prisoner currently on death row after the legislature passes a prospective-only bill. And that is because there was virtually no legal authority out there—then. That is not true any longer. Since the hearing last spring, two very important things have changed the legal landscape. The first took place in New Mexico; the second happened right here in Connecticut.

I. New Mexico Experience's with Prospective Repeal

In a decision last September, the New Mexico Supreme Court took up the issue of whether New Mexico's prospective repeal of its death penalty in 2009 should apply retroactively to a man named Michael Astorga who committed his crime before the repeal.⁶ Astorga's lawyer argued that New Mexico's legislature had spoken—although it had repealed the death penalty prospectively, this repeal effectively "set forth an evolved standard of decency which makes it cruel and unusual punishment . . . to impose the death penalty" on *anyone*.⁷ "There should be no doubt and no question," Astorga's lawyer argued, "once the death penalty has been repealed it is repealed for everyone."⁸

The New Mexico Supreme Court disagreed and dismissed Astorga's appeal.⁹ Because Astorga committed his crime before the effective date of the repeal, the New Mexico Supreme Court held that the death penalty remains on the table. Astorga's death sentencing phase is set to begin next month.¹⁰ If this Legislature passes a prospective repeal, we submit to you that the Connecticut Supreme Court would most likely follow New Mexico's lead and refuse to give your repeal retroactive effect.

There are a few other points worth noting about New Mexico's experience with prospective repeal. First, as previously noted, the New Mexico Supreme Court is the *only* state that has directly addressed the retroactivity issue that this Committee now faces.¹¹ For that reason, it will be very persuasive authority if and when the Connecticut Supreme Court takes up this issue. We will return to this point momentarily.

Second, New Mexico's death penalty repeal was passed by its legislature and signed by Governor Bill Richardson against the backdrop of a very public murder trial.¹² At the time of repeal in 2009, state prosecutors were seeking the death penalty against Michael Astorga for

fatally shooting a police officer, and lawmakers took note. After signing New Mexico's prospective repeal into law, the governor went out of his way to say that, "[m]y position as a human being is I support the death penalty in the most heinous of cases. . . . I think Astorga should go to the death penalty. But I think for the future, life in prison without parole is a huge punishment."¹³ In short, New Mexico's lawmakers made sure that their repeal, as written, would not apply retroactively to Astorga,¹⁴ and the court respected their intent.

Third, the New Mexico Supreme Court's September decision was, in fact, the second time that it upheld the constitutionality of New Mexico's prospective repeal.¹⁵ Six months earlier, in February 2011, Astorga's attorney had argued that "repeal of the death penalty in New Mexico precludes and prohibits either execution of the death penalty or the seeking of the penalty of death for [Astorga] and others likewise situated whose alleged acts of first degree murder and aggravating circumstances occurred prior to [repeal]."¹⁶ Significantly, Astorga's attorney attached to his legal brief an excerpt of the written testimony that the Connecticut Chief State's Attorney submitted to *this* Committee in 2009. In that testimony, the Chief State's Attorney made the same argument he makes now: a prospective-only death penalty will effectively nullify existing death sentences.¹⁷

The New Mexico Supreme Court was not persuaded. It disposed of Astorga's (and the Chief State's Attorney) retroactivity argument in a pithy four-word order: "Petition hereby is denied."¹⁸ The New Mexico Supreme Court's decision, completely devoid of analysis, is unequivocal: a death penalty repeal that is intended to be prospective-only will be treated as such.

Lastly, the procedural posture of Mr. Astorga's case shows just how strongly the New Mexico Supreme Court believes in the constitutionality of prospective-only repeal. Mr. Astorga committed his crime in 2006 and was convicted in 2010—a year after the death penalty was repealed. He still has not been sentenced. Despite the fact that he was convicted *after* repeal, and will be sentenced *well after* repeal, the New Mexico Supreme Court still says that it is constitutional for him to receive the death penalty. With this holding, the fate of New Mexico's two current death row inmates, Mr. Allen and Mr. Fry—both of whom were convicted and sentenced *prior* to the 2009 repeal—is most likely sealed. After all, if the New Mexico Supreme Court found no constitutional violation in allowing a death sentence for a man who was convicted after repeal, it is safe to say that the Court would most likely uphold the death penalty for two men who were convicted and sentenced years before the death penalty repeal became effective.¹⁹

As New Mexico's experience teaches, when it comes to prospective repeal, those already on death row stay on death row.²⁰ And, as for the "Astorgas" who committed capital-worthy crimes before repeal but have not yet been convicted or sentenced²¹—they, too, fall outside the protection of prospective repeal.

II. The Connecticut Supreme Court Opinion in *State v. Rizzo* (2011)

New Mexico's experience strongly supports the constitutionality of a prospective-only repeal. But even stronger support comes from within our state—from our own Connecticut Supreme Court.

If this Legislature passes a prospective-only death penalty repeal, those on Connecticut's death row may challenge their sentences on constitutional grounds, and the Connecticut Supreme Court will have to respond to those arguments. Legal scholars will tell you that your prospective-only repeal will impact the Supreme Court's analysis. And they are right—your prospective repeal *will* factor into the Court's analysis, but its likely impact will be negligible. The Connecticut Supreme Court's recent decision in *State v. Rizzo* from last November makes this clear.²²

The Geisler Factors

Your prospective repeal is unlikely to impact the constitutionality of existing death sentences because it is only one small subpart of one single factor in an elaborate six-factor test that the Connecticut Supreme Court uses to determine whether the death penalty is constitutional. Furthermore, none of these six factors is dispositive—no one factor rules the day. The Connecticut Supreme Court has characterized these factors, which were first enumerated in the case of *State v. Geisler*,²³ as “inextricably interwoven.”²⁴ This six-factor test is what we call a “totality” test,²⁵ and the Connecticut Supreme Court has used it for twenty years, and has upheld the constitutionality of the death penalty *every single time* it has used it.²⁶

In applying the *Geisler* factors, the Connecticut Supreme Court reminds us that the burden of proving that a statute is unconstitutional is an extraordinarily high one:

In our assessment of whether the statute passes constitutional muster, we proceed from the well recognized jurisprudential principle that “[t]he party attacking a validly enacted statute . . . bears *the heavy burden* of proving its unconstitutionality *beyond a reasonable doubt* and we *indulge in every presumption in favor of the statute's constitutionality*. . . . In choosing between two constructions of a statute, one valid and one constitutionally precarious, we will search for an *effective and constitutional construction that reasonably accords with the legislature's underlying intent*. . . . We undertake this search for a constitutionally valid construction when confronted with criminal statutes as well as with civil statutes. The burden of proving unconstitutionality is *especially heavy* when, as at this juncture, a statute is challenged as being unconstitutional on its face.”²⁷

The first five factors the Court will look at are: “(1) the text of the constitutional provisions; (2) related Connecticut [court] precedents; (3) persuasive federal [court] precedents; (4) persuasive precedents of other state courts; and (5) historical insights into the intent of our constitutional forbearers.”²⁸ The Connecticut Supreme Court has repeatedly told us that none of these five factors supports the conclusion that the death penalty is unconstitutional. Quite the opposite—in

case after case, the Court has upheld the death penalty based on these five factors. This past November, in the case of *State v. Rizzo*, the Connecticut Supreme Court reiterated its conclusion that these factors “do not support the . . . claim that the death penalty should be declared unconstitutionally unacceptable on its face.”²⁹ So, under five of the six *Geisler* factors, a prospective-death penalty will survive constitutional challenge.

Now that leaves the sixth factor. The Connecticut Supreme Court tells us that this factor is about “policy considerations,”³⁰ namely, “contemporary understandings of applicable economic and sociological norms.”³¹ While the Legislature is a reliable indicator of contemporary values,³² the Connecticut Supreme Court reminds us that you are not the only indicator. Not by a long shot. “[I]t is also appropriate,” the Court tells us, “to consider what is occurring in actual practice.”³³ In addition to the actions of the Legislature, the Court looks at still more indicators, including: (i) the number of inmates on death row nationwide,³⁴ (ii) the number of executions in recent years,³⁵ (iii) the imposition of new death sentences,³⁶ (iv) public opinion concerning the death penalty,³⁷ and (v) death penalty practices in other countries.³⁸

So under the sixth factor, the Court will look at *six separate subparts*, of which the actions of the Legislature are but one. This means that your prospective-only repeal will affect only one-sixth of one factor in *Geisler*’s six-factor test.³⁹ This is not a sea-change, and it will not turn the tide. Your prospective-only repeal will be a drop in the bucket for Connecticut’s Supreme Court to mention and move on.⁴⁰

The Connecticut Supreme Court’s application of the six-factor *Geisler* test over the past twenty years, and most recently in *State v. Rizzo*, shows how existing death row sentences will withstand constitutional scrutiny after a prospective repeal. And if that were not enough, the Court did something else in its *Rizzo* opinion from last November—it included a footnote citing federal and state authority supporting the constitutionality of existing death sentences after prospective repeal.

State v. Rizzo’s Footnote 88

In footnote 88 of the *Rizzo* opinion, the Connecticut Supreme Court strongly signals that existing death sentences will remain constitutional after prospective repeal, and it does so in two very significant ways. First, the Court goes out of its way to note that New Mexico’s legislature recently repealed its death penalty prospectively, and that its repeal has not been given retroactive effect.⁴¹ Significantly, the Court then attempts to reconcile how New Mexico could abolish its death penalty prospectively while constitutionally maintaining its existing death row intact. “Given the circumstances,” the Connecticut Supreme Court explains, “it is unlikely that the New Mexico legislature was convinced that the death penalty is intolerable under any and all circumstances.”⁴²

The Court’s discussion of New Mexico’s prospective repeal is significant. Remember that the persuasive precedents of other state courts are something that the Court is very interested in under *Geisler*, and New Mexico could not be more persuasive. New Mexico is, after all, the *only* state that has prospectively repealed its death penalty while keeping its existing death row intact—exactly as Connecticut is contemplating doing.

And the Connecticut Supreme Court does not stop there. In that same footnote, the Connecticut Supreme Court does something else significant—it cites U.S. Supreme Court Justice Antonin Scalia for the proposition that prospective repeal of a statute does not mean that the statute is unconstitutional. According to Justice Scalia, “[prospective abolition] is not a statement of absolute moral repugnance, but one of current preference between two [constitutionally] tolerable approaches.”⁴³

Now why would the Connecticut Supreme Court go out of its way to reconcile New Mexico’s prospective repeal and the constitutionality of its existing death row? And why would the Court go to the further trouble of citing Justice Scalia in support of New Mexico’s prospective repeal (when the New Mexico Supreme Court decision, itself, nowhere cites Justice Scalia or any other case precedent)?

The answer, we believe, is that the Connecticut Supreme Court finds no constitutional problem with abolishing the death penalty prospectively and maintaining an existing death row intact. If this Legislature wants to know how the Court will rule on the constitutionality of existing death sentences following a prospective repeal, footnote 88 provides the answer.

Prospective repeal, the Connecticut Supreme Court tells us, does not mean unconstitutional. You, the Legislature, are a reliable indicator of contemporary values.⁴⁴ Through a prospective-only bill, you would not be telling the Court that you believe the death penalty is unconstitutional. Rather, you would be telling the Court that you are choosing between two perfectly constitutional choices: to keep the death penalty or to abolish it prospectively. And if you choose the latter, we submit that the Connecticut Supreme Court will most likely respect your decision. Footnote 88 makes this clear.⁴⁵

III. Conclusion

In conclusion, the Connecticut Supreme Court has shown you how it will most likely rule on constitutional challenges brought by those currently on death row. It will dismiss those appeals. The Court’s six-factor *Gelsler* test tells you that. And the Court’s footnote 88—which cites both federal and state precedent in support of the constitutionality of existing death sentences after prospective repeal—tells you that.

Refusing to act on a prospective-only bill based on a specious legal argument that the New Mexico Supreme Court—the only court to have addressed this issue—explicitly rejected, and that the Connecticut Supreme Court would most likely reject as well, is not the way to make policy. It is a self-serving means of maintaining the status quo in perpetuity. The better route, we think, is for this Legislature to say exactly what it means in the statute and in the legislative history that you create, and trust that the Court will follow its own precedent and New Mexico’s lead.

If this Legislature believes that the death penalty should be maintained for those currently on death row and abolished prospectively, we submit that Raised Bill No. 280 will do just that. We urge this Committee to do justice and approve Raised Bill No. 280.

Thank you very much for your time and for the opportunity to present this testimony.

Quinnipiac University School of Law Civil Justice Clinic

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¹ See, e.g., Connecticut Judiciary Committee Hearing Transcript (Mar. 7, 2011) [hereinafter "2011 Judiciary Committee Hearing Transcript"] (comments of Chief State's Attorney Kevin Kane); Testimony of State of Connecticut Division of Criminal Justice, [S.B. No. 1035, An Act Repealing the Death Penalty; H.B. 6425, An Act Revising the Penalty for Capital Felonies], Judiciary Comm., at 2 (Mar. 7, 2011); Testimony of State of Connecticut Division of Criminal Justice, S.B. No. 1027, An Act Concerning Legal Standards in Capital Cases; H.B. No. 6578, An Act Concerning the Penalty for a Capital Felony, Judiciary Comm., at 1 (Mar. 2, 2009).

² *State v. Rizzo*, 303 Conn. 71, 203 (2011) (Norcott, J., dissenting).

³ 2011 Judiciary Committee Hearing Transcript.

⁴ 2011 Judiciary Committee Hearing Transcript ("[W]hen [prospective-only repeal] first came up a couple of years ago, I couldn't think of an argument that could be made on behalf of the state which would likely result in a finding that the death penalties that have been—that are in effect can be carried out. And through and through the years, I've talked to a lot of people who are smarter than I am and I'm still at a loss as to the nature of the argument that we'd make.") (comments of Connecticut Chief State's Attorney Kevin Kane).

⁵ 2011 Judiciary Committee Hearing Transcript (comments of Chief of Habeas Corpus Services Temmy Pieszak).

⁶ The text of New Mexico's law prospectively repealing the death penalty mirrors that of Raised Bill No. 280 insofar as both repeal the death penalty only for *crimes committed* on or after the effective date of the law. See An Act Revising the Penalty for Capital Felonies, S.B. 280, Feb. Sess. (Ct. 2012); An Act Relating to Capital Felony Sentencing, Abolishing the Death Penalty, Providing for Life Imprisonment Without the Possibility of Release or Parole, H.B. 285, 49th Leg., 1st Sess. (N.M. 2009).

⁷ Petitioner's Brief at 9, *Astorga v. State of New Mexico* (August 26, 2011) (No. 33,152).

⁸ Petitioner's Emergency Petition for Writ of Superintending Control and Request for Stay of Proceedings, at 6, *Astorga v. State of New Mexico* (December 10, 2010) (No. 33,152) [hereinafter "Petitioner's Emergency Petition"].

⁹ Order of New Mexico Supreme Court, *Astorga v. State of New Mexico* (September 1, 2011) (No. 33,152) [hereinafter "September 2011 Order of New Mexico Supreme Court"].

¹⁰ Chris Ramirez, *More than 2,500 Jury Summons Sent for Astorga Death Penalty Trial*, *KOB.com* (Feb. 9, 2012), <http://www.kob.com/article/stories/s2490676.shtml>.

¹¹ Alex Tomlin, *Death Penalty Ban Raises New Argument*, *KRQE.com* (Mar. 10, 2011), <http://www.krqe.com/dpp/news/crime/death-penalty-ban-raises-new-argument> ("New Mexico stands as the only state in our nation's history to have repealed the death penalty and/or have the death penalty declared unconstitutional and still try to execute one or more of its citizens.") (quoting Michael Astorga's attorney, Gary Mitchell).

¹² Defendant's Motion to Dismiss the Death Penalty with Memorandum of Law at 3, *State of New Mexico v. Astorga* (Nov. 1, 2010) (No. CR-2006-1670) [hereinafter "Defendant's Motion to Dismiss"] (stating that "[Astorga] case has received massive publicity and has been the subject of debate in the 2010 gubernatorial race").

¹³ Crystal Gutierrez, *Gov Subpoenaed in Death-Penalty Case*, *KRQE News* 13 (Nov. 23, 2010, 7:13 PM), <http://www.krqe.com/dpp/news/crime/gov-subpoenaed-in-death-penalty-case>.

¹⁴ Defendant's Motion to Dismiss at 3 ("Legislative debate, according to some involved, on the repeal of the death penalty include a compromise, 'no repeal for Michael Astorga.' This appears to have been the compromise the governor and certain legislators requested/demanded in order to support and/or sign the repeal bill.").

¹⁵ Order of New Mexico Supreme Court, *Astorga v. State of New Mexico* (Feb. 4, 2011) [hereinafter "February 2011 Order of New Mexico Supreme Court"].

¹⁶ Petitioner's Emergency Petition at 3.

¹⁷ Defendant's Motion to Dismiss at 18-19.

¹⁸ February 2011 Order of New Mexico Supreme Court.

¹⁹ Defendant's Motion to Dismiss at 20 ("Mr. Astorga's classification is even more pronounced than that of [current death row inmates] Mr. Allen and Mr. Fry because he was not convicted prior to the repeal nor has he been sentenced to death prior to repeal.").

²⁰ There are currently eleven people on Connecticut's death row. See Christopher Reinhart, *Death Row Inmates*, OLR RESEARCH REPORT (April 11, 2011), <http://www.cga.ct.gov/2011/rpt/2011-R-0170.htm> (listing only ten death row inmates because report was published before Komisarjevsky was sentenced to death).

²¹ According to Connecticut Chief Public Defender, Susan O. Storey, there were "61 capital cases . . . pending at various stages of pretrial, trial, appeal or habeas corpus" as of March 2, 2009. Testimony of Susan O. Storey, Chief Public Defender, Raised Bill No. 6578, An Act Concerning the Penalty for Capital Felony, Judiciary Comm., at 1 (Mar. 2, 2009).

²² See *Rizzo*, 303 Conn. at 184-201. An excerpt of the *Rizzo* decision is attached to this testimony as Attachment B. As a general matter, courts respect laws that are explicitly prospective. See *Meade v. Comm'r of Correction*, 282 Conn. 317, 321 (2007) ("When considering the retroactivity of a penal statute, it is axiomatic that, whether to apply a statute retroactively or prospectively depends upon the intent of the legislature. . . . [S]tatutes that affect substantive rights are presumed to apply prospectively only."). Raised Bill No. 280 is clearly prospective. If this bill becomes law, the critical legal question for the Connecticut Supreme Court will *not* be whether the Legislature intended the law to apply retroactively, but rather whether this clearly prospective law renders the sentences of people already on death row cruel and unusual in violation of the state and federal constitutions. Because the Connecticut Supreme Court is "bound by precedents of the United States Supreme Court holding [that the death penalty does not violate the eighth amendment to the United States constitution]," this testimony focuses on the state constitution. *Rizzo*, 303 Conn. 184 n.82 ("It is the prerogative of [the U.S. Supreme Court] alone to overrule its own precedents, even if subsequent decisions or developments may appear to have significantly undermined the rationale for an earlier holding."). Specifically, the body of this testimony focuses on the "cruel and unusual" argument; the equal protection argument is addressed in footnote 45 of this testimony.

²³ *State v. Geisler*, 222 Conn. 672 (1992).

²⁴ *State v. Morales*, 232 Conn. 707, 716 (1995).

²⁵ See, e.g., *State v. Ledbetter*, 566 Conn. 534, 569 (2005) ("In light of the [*Geisler*] factors that weigh in favor of the state," the fact that the sixth *Geisler* factor "favors the defendant . . . is insufficient to tilt the balance of the *Geisler* analysis in favor of the defendant.").

²⁶ See, e.g., *Rizzo*, 303 Conn. at 201; *State v. Webb*, 238 Conn. 389, 401-12 (1996); *State v. Ross*, 230 Conn. 183, 249-52 (1994); see also *State v. Lockhart*, 298 Conn. 537 (2010) (relying on *Geisler* factors to uphold constitutionality of unrecorded confessions); *State v. Jenkins*, 298 Conn. 209 (2010) (relying on *Geisler* factors to uphold constitutionality of consent search procedures during traffic stops); *State v. Wade*, 297 Conn. 262 (2010) (relying on *Geisler* factors to uphold constitutionality of "aggregate package theory" in resentencing).

²⁷ *State v. Ross*, 230 Conn. at 249-52 (emphasis added).

²⁸ *Rizzo*, 303 Conn. at 185.

²⁹ *Id.* at 185; see *id.* at 188 (stating that "[Connecticut's] constitution contains explicit references to capital punishment . . . and, therefore, expressly sustains the constitutional validity of such a penalty in appropriate circumstances," and that challenges to the constitutionality of Connecticut's death penalty "must be evaluated against this clear textual backdrop").

³⁰ *Id.* at 143.

³¹ *Id.* at 186.

³² *Id.* at 191.

³³ *Id.*

³⁴ *Id.* at 191-92.

³⁵ *Id.* at 192.

³⁶ *Id.* at 193.

³⁷ *Id.* at 194.

³⁸ *Id.* at 195.

³⁹ While this Legislature's passage of a prospective-only appeal would undoubtedly enter into the Connecticut Supreme Court's analysis of the sixth *Geisler* factor, it is not at all clear that the Court would interpret your prospective repeal as "embod[ying] a moral judgment" against the death penalty. *Rizzo*, 303 Conn. at 188. On the contrary, the Connecticut Supreme Court in *Rizzo* recognized that the decision of other states to abandon the death penalty was "based on a variety of public policy determinations made by legislators and governors"—many of

which have nothing to do with evolving standards of decency. *Id.* at 190 (emphasis added); *see also* State of New Mexico's Response to Petition for Writ of Superintending Control at 11, *Astorga v. State of New Mexico* (Jan. 27, 2011) (No. 32,744) (successfully arguing before New Mexico Supreme Court that Legislature's reason for prospectively repealing death penalty was not necessarily to "express an evolved standard of decency that rejects the death penalty as cruel and unusual punishment. . . . [O]ther reasons exist and, in fact, were discussed during the process of passing the repeal. High on the list of those reasons is the perceived *high cost of death penalty litigation*. Given the ongoing state budget shortfalls, and the fact that [non-economic] concerns were not enough to achieve repeal in the past, there is simply insufficient grounds to conclude that the prospective repeal signals a statewide consensus that the death penalty is contrary to an evolved standard of decency, as opposed to *a desire to eliminate the costs of death penalty litigation*." (emphasis added) (internal citations omitted) [hereinafter "State's Response"]. An excerpt of the State's Response is attached to this testimony as Attachment A.

⁴⁰ *Cf.* Ledbetter, 566 Conn. at 569 (upholding constitutionality of eyewitness identification procedures based on *Geisler* factors, despite fact that sixth *Geisler* factor favored defendant).

⁴¹ *Rizzo*, 303 Conn. at 190 ("Notably, the New Mexico ban is prospective only and no clemency has been granted to convicted capital offenders, leaving that state's existing death row intact.").

⁴² *Id.* at 190 n.88.

⁴³ *Id.* (citing *Atkins v. Virginia*, 536 U.S. at 342) (Scalia, J., dissenting).

⁴⁴ *Id.* at 191.

⁴⁵ Although the claim that the death penalty is cruel and unusual in violation of the state constitution would most likely fail, we note that an equal protection claim is even weaker. To show an equal protection violation, one first must show that similarly situated parties are treated differently. For example, a prisoner on death row who committed first degree murder before repeal might argue that it is a violation of the state's equal protection clause to impose the death penalty because he is similarly situated to a person who committed first degree murder after repeal and was sentenced to life without the possibility for parole. This argument likely fails for three reasons.

First, as Attorney Pieszak stated at the hearing before this Legislature last spring, the person on death row and the person not on death row are not similarly situated—each committed a crime under a different statutory scheme. *See* 2011 Judiciary Committee Hearing Transcript (comments of Chief of Habeas Corpus Services Temmy Pieszak); *see also* State's Response at 13 ("[The prisoner on death row] is not similarly situated to . . . individuals [not on death row] because he was on notice at the time he committed his crime that the maximum possible sentence . . . was death.").

Second, even if the Connecticut Supreme Court were to find that the parties are similarly situated, an equal protection claim would most likely still fail. As Attorney Pieszak noted at the hearing last spring, all the State would need to show to overcome this claim is that the Legislature had some "rational basis" for treating similarly situated individuals differently. This would not be a difficult test to meet. *See* 2011 Judiciary Committee Hearing Transcript (comments of Chief of Habeas Corpus Services Temmy Pieszak); *see also* *Rayhall v. Akim Co., Inc.*, 263 Conn. 328, 342 (2003) ("[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."). For example, the State could argue, as New Mexico's Attorney General successfully argued last year, that prospective-only repeal furthers the legitimate penological goals of retribution and deterrence:

The Legislature chose to hold first degree murderers to the consequences for their crimes, as those consequences existed when they committed their crimes. The goal of deterrence is also met, certainly with respect to an executed murderer's inability to commit future murders, but also with respect to communicating to all criminals that they will be held accountable for their crimes in the manner in which the law provides when they commit them.

...

It is perfectly proper for the Legislature to create a new sentencing procedure which operates prospectively only. Despite the disparity created by rendering different sentences after an admittedly arbitrarily chosen date, prospective application of such a statute does not violate equal protection principles, because of the

legitimate public purpose of assuring that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.

State's Response at 10, 20 (internal quotation marks omitted).

Importantly, the Connecticut Supreme Court would most likely not apply "strict scrutiny"—which requires a far more searching inquiry than the deferential "rational basis" test—because prospective-only repeal does not "invidiously discriminate[] against a suspect class or affect[] a fundamental right." *Rayhall*, 263 Conn. at 343; *see Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 159 (2008) (stating that classifications based on "religion, race, color, ancestry, national origin, sex, physical disability and mental disability" trigger strict scrutiny); State's Response at page 16-18 ("[C]ourts uniformly apply the rational basis test to sentencing disparities that result from prospective application of newly enacted penal statutes, or amendment or repeal of existing penal statutes.") (citing U.S. Supreme Court precedent in support of rational basis review); *see id.* at 19 (stating that if strict scrutiny were applied to prospective repeal, "strict scrutiny would necessarily apply to every penal statute, newly enacted, amended, or repealed," which ignores both the "Legislature's policy making authority" and the furtherance of the "penological goals of retribution and deterrence.").

Third, the New Mexico Supreme Court—the only state court to have addressed an equal protection claim in the context of a prospective death penalty repeal—squarely rejected this claim. Michael Astorga's attorney argued that it was a violation of equal protection for the State to pursue the death penalty against Astorga while at the same time refusing to pursue the death penalty against those who committed similar crimes after passage of the 2009 prospective-only repeal. The New Mexico Supreme Court disagreed. *See* February 2011 Order of New Mexico Supreme Court; September 2011 Order of New Mexico Supreme Court.

Attachment A

Excerpt of State of New Mexico's
Response to Petition for Writ of Superintending Control
&
February 4, 2011 Order of New Mexico Supreme Court

RECEIVED JAN 27 2011

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MICHAEL PAUL ASTORGA,

Petitioner,

vs.

No. 32,744

HON. NEIL C. CANDELARIA, District
Court Judge, Second Judicial District,
Bernalillo County, New Mexico,

Respondent,

and

STATE OF NEW MEXICO, by and through
its Second Judicial District Attorney, KARI
E. BRANDENBURG,

Real Party in Interest.

**RESPONSE TO PETITION FOR
WRIT OF SUPERINTENDING CONTROL**

SUPREME COURT OF NEW MEXICO
FILED

JAN 26 2011

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(505) 222-9000

[Pages 1-3 omitted]

and adequate remedy other than by issuance of the writ. See Albuquerque Gas & Elec. Co., 43 N.M. at 240-41; Martinez, 2001-NMSC-009, ¶¶ 12-17.

Respondent and the State assert that Petitioner has failed to establish grounds for this Court to grant a writ of superintending control to require Respondent to dismiss the death penalty and impose a life sentence for Petitioner's conviction for first degree murder of a peace officer. Respondent's denial of Petitioner's motion was not erroneous or arbitrary. In addition, because Petitioner will have the right to a mandatory appeal if the death penalty is imposed, Respondent's decision does not result in irreparable harm to Petitioner for which Petitioner has no adequate remedy at law.

II. RESPONDENT DID NOT ERR IN CONCLUDING THAT THE PROSPECTIVE REPEAL OF THE DEATH PENALTY DOES NOT RENDER THE DEATH PENALTY, AS APPLIED TO PETITIONER, UNCONSTITUTIONAL.

- A. The prospective repeal of the death penalty does not establish a consensus that contemporary standards of decency have evolved to reject the death penalty as cruel and unusual punishment for the intentional killing of a police officer.

The death penalty has been an available punishment for capital felonies in New Mexico since before statehood. See Territory v. Ketchum, 10 N.M. 718, 65 p.169 (1901). This Court has rejected every attempt to have the death penalty declared *per se* unconstitutional as cruel and unusual punishment. See Id. at 719-724, 65 P. at 169-171; State v. Pace, 80 N.M. 364, 371-372, 465 P.2d 197, 205

(1969); State ex rel. Serna v. Hodges, 89 N.M. 351, 354-367, 552 P.2d 787, 790-793 (1976); State v. Garcia, 99 N.M. 771, 777, 975, 664 P.2d 969 (1983); State v. Cheadle, 101 N.M. 282, 289-290, 681 P.2d 708, 715-716 (1984); State v. Finell, 101 N.M. 732, 736, 688 P.2d 769, 773 (1984); State v. Compton, 104 N.M. 683, 695, 726 P.2d 837, 849 (1986); State v. Clark, 1999-NMSC-035, ¶¶ 60-61, 128 N.M. 119.

However, over the decades, the statutes implementing the death penalty have been modified to narrow the class of offenses for which the death penalty may be imposed. For example, in 1969 the then-existing death penalty statute was amended to limit the death penalty to first degree murders committed under three aggravating circumstances: (1) killing a police officer, (2) killing a jail or prison guard, and (3) committing a second first degree murder “after time for due deliberation following commission of a capital felony.” State v. Rondeau, 89 N.M. 408, 413, 553 P.2d 688, 693 (1976) (quoting NMSA 1953 § 40A-29-2.1 (1969)); State v. Trivitt, 89 N.M. 162, 166-167, 548 P.2d 442, 445 (1976) (noting that the 1969 amendments limited the death penalty to first degree murder).

The statutes have also been modified to comply with the requirements of the Eighth Amendment as determined by the United States Supreme Court. For example, in 1973, the 1969 statute was replaced with a provision making the death penalty mandatory for any person convicted of a capital felony. *See Hodges*, 89

N.M. at 352, 552 P.2d at 788. This change was a direct response to the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), in which a plurality struck down the Georgia death penalty statute for failing to provide sufficient protections against the imposition of the death penalty in an arbitrary and capricious manner. Id. Like the Georgia statute, the 1969 New Mexico statute established the jury's role in determining whether a life or death sentence would be imposed without providing procedures to ensure that the jury did not exercise its discretion in an arbitrary or capricious manner. *See* NMSA 1953 § 40A-29-2 (1969). The Legislature's solution to this problem was to eliminate all discretion in determining whether the death penalty should be imposed.

The Supreme Court subsequently invalidated that solution in Woodson v. North Carolina, 428 U.S. 280 (1976) by holding that a statute making the death penalty mandatory violates the Eighth Amendment. *See* Rondeau, 89 N.M. at 411, 553 P.2d at 691. The Legislature responded by enacting the CFSA, which made the death penalty optional, increased the list of aggravating circumstances, and provided specific procedures to guide the decision maker's choice of sentence and minimize the risk that the choice is made in an arbitrary and capricious manner. The CFSA has survived numerous attacks challenging its constitutionality under

the Eighth Amendment. *See Garcia, supra.; Cheadle, supra.; Finell, supra.; Compton, supra.; Clark, supra.*

In addition, the CFSA survived repeated attempts at legislative repeal, until 2009 when the bill proposing repeal included a provision to replace the death penalty with a mandatory sentence of life without the possibility of parole for first degree murder committed under an aggravating circumstance. NMSA 1978, §§ 31-20A-1 through 6 (2009). That bill also included a savings clause providing that the repeal was prospective and, therefore, did not apply to first degree murders committed before July 1, 2009. *See* Petition for Writ of Superintending Control and Request for Stay (Petition), Exhibit A (Motion to Dismiss and Exhibit A (House Bill 285, Section 6, stating the provisions of the repeal act “apply to crimes committed on or after July 1, 2009.”).

Petitioner argues the repeal of the death penalty establishes “an evolved standard of decency which makes it cruel and unusual punishment as a violation of due process to impose the death penalty.” Petition, p. 4. In determining whether a state-imposed punishment is “so disproportionate as to be cruel and unusual punishment,” the Supreme Court “refer[s] to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 110-101 (1958)). In so doing, the Court compares the number of states prohibiting a particular punishment with

the number of states imposing it to discern whether “a national consensus has developed against it.” Roper, 543 U.S. at 562 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). In addition, the Court will exercise its own judgment and examine the extent to which the punishment serves the penological interests that justify it. *See Roper*, 543 U.S. at 563, 571.

The New Mexico Legislature’s prospective repeal of the death penalty does not establish a national consensus that the death penalty is so disproportionate to the first degree murder of a police officer that it exceeds contemporaneous standards of decency. Petitioner attempts to bolster his claim with reference to the prospective repeal of the death penalty by the New Jersey legislature. Even taking that legislation into account, however, the repeal of the death penalty by two states does not establish a national consensus against the death penalty when thirty-six states continue to authorize the death penalty for aggravated first degree murder.¹

Nor can Petitioner support a claim that the repeal of the death penalty by two states evinces a trend toward abolishing the death penalty. Not only is two far short of a trend, it appears the two decisions are far from final. In both New Mexico and New Jersey, efforts to reinstate the death penalty are underway. *See Archbishop: Keep Ban On Death Penalty*, Albuquerque Journal, January 20, 2011, at A1, A4;

¹ *See* United States Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2009 – Statistical Tables (found at <http://ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2215>).

<http://www.app.com/article/20110119/NEWS03/101190388/Lawmaker-drafts-bill-to-OK-death-penalty-for-cop-killers>. Prospective repeal of the death penalty that has since been highly controversial, and even the subject of political debate in the recent gubernatorial election² (in which the candidate in favor of the death penalty won) can hardly be described as an indicator of the citizenry's evolved standard of decency rejecting the death penalty as immoral or so disproportionate as to be cruel and unusual punishment.

Furthermore, prospective repeal by two states does not establish grounds for concluding that the death penalty is no longer justified by the penological goals of deterrence and retribution. Even in recent cases in which the Supreme Court invalidated imposition of the death penalty on juveniles (Roper) and on mentally retarded persons (Atkins), the Court continued to recognize that the death penalty in general serves both penological goals of retribution and deterrence. *See Atkins*, 536 U.S. at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); Roper, 543 U.S. at 571 (quoting Atkins, 536 U.S. at 319). The Court concluded, however, that those justifications apply with less force to juveniles and mentally retarded persons who are, by their youth and mental condition, less culpable than other first degree murderers. *Id*

² *See Dueling Over Death Penalty*, Albuquerque Journal Online Edition, June 8, 2010 (found at <http://www.abqjournal.com/news/state/082335485340newsstate06-08-10.htm>).

Here, the prospective repeal leaves the death penalty available as punishment for first degree murders committed before July 1, 2009. In other words, the Legislature chose to hold first degree murderers to the consequences for their crimes, as those consequences existed when they committed their crimes. That choice is clearly justified by the penological goal of retribution. The goal of deterrence is also met, certainly with respect to an executed murderer's inability to commit future murders, but also with respect to communicating to all criminals that they will be held to account for their crimes in the manner in which the law provides when they commit them. *See People v. Gilchrist*, 133 Cal. App. 3d 38, 45, 183 Cal.Rptr. 709 (1982) (recognizing "the legitimate public purpose of assuring that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written" (internal quotation marks omitted)).

In an effort to avoid the obvious conclusion that the prospective repeal of the death penalty by the New Mexico Legislature does not establish a national consensus against the death penalty, Petitioner argues that the repeal establishes a statewide consensus to reject the death penalty as cruel and unusual punishment. However, Petitioner fails to explain how a prospective repeal of the death penalty – repeal that leaves the death penalty available as punishment for first degree murders committed before July 1, 2009 – signals rejection of the death penalty on moral grounds. If a clear consensus existed among the citizens of New Mexico

that the death penalty offends our standards of decency, then the citizens' representatives would have eliminated the death penalty as punishment for any murderer, including those already under a sentence of death and those who killed at a time when the death penalty was the maximum punishment.

Moreover, Petitioner's argument suggests that the only possible reason for repealing the death penalty is to express an evolved standard of decency that rejects the death penalty as cruel and unusual punishment. Yet, other reasons exist and, in fact, were discussed during the process of passing the repeal. *See Death Penalty Repeal Passes House*, Albuquerque Journal Online, February 11, 2009 (found at http://www.abqjournal.com/abqnews/index.php?option=com_content&view=article&Id.=10740:death-penalty-repeal-passes-house&catid=1:latest&Itemid=39). High on the list of those reasons is the perceived high cost of death penalty litigation. Given the ongoing state budget shortfalls,³ and the fact that other concerns were not enough to achieve repeal in the past,⁴ there is simply insufficient grounds to conclude that the prospective repeal signals a statewide consensus that the death penalty is contrary to an evolved standard of decency, as opposed to a desire to eliminate the costs of death penalty litigation.

³ *See Richardson Drops Bomb*, Albuquerque Journal Online, November 12, 2010 (found at <http://www.abqjournal.com/newsstate/122349494548newsstate11-12-10.htm>).

⁴ *Death Penalty Repeal Passes House*, *supra*.

The citizens of this state do not elect judges to resolve highly contested debates over the difficult policy choices that must be made with respect to crime and punishment. We elect legislators to resolve those debates, with the understanding that we can return to our legislators and demand correction if we are not satisfied with their decisions. We elect judges to “ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws.” State v. Thompson, 57 N.M. 459, 465, 260 P.2d 370, 374 (1953). Therefore, “[i]t is no part of the duty of the courts to inquire into the wisdom, the policy, or the justness of an act of the legislature.” Id. A decision by this Court resolving the debate over the death penalty at this time in history, when the debate is strong and ongoing, would violate our trust that the judiciary and the Legislature will keep to their separate roles, a separation that is vital to the proper functioning of our government. *See Id.* at 466 (“The courts are by the constitution not made critics of the legislature, but rather guardians of the Constitution; and, though the courts might have a doubt as to the constitutionality of the legislative act, all such doubts must be resolved in favor of the law.”).

B. The prospective repeal of the death penalty does not result in the denial of equal protection to Petitioner and others who committed aggravated first degree murder before July 1, 2009.

Petitioner argues that prospective application of the repeal statute violates his rights to equal protection of the laws under the state and federal constitutions.

“The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly.” Breen v. Carlsbad Municipal Schools, 2005-NMSC-028, ¶ 10, 138 N.M. 331, 120 P.3d 413. According to Petitioner, the repeal statute treats him differently from other individuals similarly situated. It does not. The repeal statute creates a class of individuals who are not similarly situated to Petitioner – persons who commit first degree murder under an aggravating circumstance after July 1, 2009. Petitioner is not similarly situated to those individuals because he was on notice at the time he committed his crime that the maximum possible sentence for killing a police officer was death. *See Nestell v. State*, 954 P.2d 143, 145 (Okla.Cr.App. 1998) (rejecting an equal protection claim because the defendant was not similarly situated to persons who committed their crimes after the effective date of the Oklahoma Truth in Sentencing Act and noting the defendant’s choice to commit his crime on a date prior to the effective date).

Petitioner is similarly situated to all persons who chose to commit first degree murder under an aggravating circumstance before July 1, 2009. Like Petitioner, each of those persons was on notice that they would be eligible for the death penalty for their crimes. The repeal statute does not treat Petitioner differently from those persons. Instead, the repeal statute creates a new class of

individuals who can never be eligible for the death penalty,⁵ but who are eligible to be sentenced to life without the possibility of parole. The repeal statute treats those persons the same, as well.

Even if the repeal statute creates a class of similarly situated individuals from which it singles out individuals for different treatment, such treatment bears a rational relationship to a legitimate public purpose. As discussed above, the decision to apply the repeal statute prospectively furthers the penological goals of retribution and deterrence.

In addition, because the repeal statute replaces the death penalty with a mandatory sentence of life without the possibility of parole, the Legislature "could have been concerned with avoiding *ex post facto* claims." Hunt v. Nuth, 57 F.3d 1327, 1335 (4th Cir. 1995) (in federal habeas review of state court sentence, rejecting claim that equal protection clause required retroactive application of statute creating option of life without the possibility of parole as alternative to death sentence). Under the repeal statute, a person who commits aggravated first degree murder is no longer entitled to present mitigation evidence to convince the jury to impose a life sentence with the possibility of parole. *See* NMSA 1978, 31-20A-2 (2009). As a result, "if the statute applied retroactively, a defendant who

⁵ Even if the repeal statute is itself repealed and the death penalty is reinstated, persons who commit aggravated first degree murder while the repeal statute is in effect cannot be sentenced to death. *See* N.M.Const. Art. II, § 19.

committed a crime before the statute's effective date and received a sentence of life without parole could argue that he received a greater sentence than if he had received only a life sentence with the possibility of parole." Hunt, 57 F.3d at 1335. Avoiding such claims is a rational basis, sufficient to overcome an equal protection claim, for making the repeal prospective instead of retroactive. Id.

Petitioner argues that his equal protection claim should be analyzed under the strict scrutiny standard rather than the rational basis standard. Determination of which level of scrutiny applies to a given case is based on "either the right or the nature of the group affected by the legislation." Breen, 2005-NMSC-028, ¶ 6. Strict scrutiny applies to legislative classifications that involve a "suspect class" such as race and national origin. State v. Rotherham, 1996-NMSC-048, 122 N.M. 246, 254, 923 P.2d 1131, 1139. Petitioner correctly does not argue that the repeal statute creates classifications that involve a suspect class. See Id. (A suspect class is "a discrete group saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." (internal quotations and citations omitted)).

Strict scrutiny also applies when the classification creates "inequalities bearing on fundamental rights." Id. "[A] fundamental right is that which the Constitution explicitly or implicitly guarantees." Id. (quoting San Antonio Indep.

Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Based on the explicit constitutional guarantee to the right not to be “deprived of life, liberty, or property without due process of law,” U.S.Const. amend V., this Court has found an implicit fundamental right to life and liberty. Rotherham, 122 N.M. at 254, 923 P.2d at 1139. According to Petitioner, the repeal statute bears on his fundamental right to life and, therefore, requires strict scrutiny, under which the State must establish that the statute’s classification “serves a compelling governmental interest and is suitably tailored to serve that interest.” Id. at 255, 923 P.2d at 1140.

Petitioner applies the fundamental right component of equal protection analysis too broadly. “A State has wide latitude in fixing the punishment for state crimes.” Williams v. Illinois, 399 U.S. 235, 241 (1970). In exercising that latitude, the Legislature “may choose to differentiate between crimes based on aggravating conduct of the accused, and it may impose differing degrees of punishment based on the severity of the crime.” State v. Padilla, 2008-NMSC-006, ¶ 13, 143 N.M. 310, 176 P.3d 299. Doing so, however, does not implicate a fundamental right to liberty that justifies strict scrutiny of the Legislature’s sentencing classifications. Chapman v. United States, 500 U.S. 453, 464-465 (1991).

Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. But a person who *has*

been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context . . . an argument based on equal protection essentially duplicates an argument based on due process.

Id. (internal citations omitted). Applying the reasoning of Chapman, state courts employ the rational basis test in reviewing equal protection challenges to state penal statutes. See State v. Harper, 111 P.3d 482, 484 (Colo.App. 2004); State v. Wright, 246 Conn. 132, 140, 716 A.2d 870, 875 (1998); State v. Smith, 48 S.W. 3d 159, 170 n. 7 (Tenn.Crim.App. 2000); State v. DeJesus, 947 A.2d 873, 885 (Rhode Island 2008); State v. Smart, 2001 WI App. 240, ¶¶ 4-5, 257 Wis. 2d 713, 652 N.W.2d 429.

Indeed, the rational basis test is uniformly applied to challenges based on disparate sentencing. For example, applying rational basis analysis, federal courts have rejected equal protection challenges to the sentencing disparity created by Federal Sentencing Guidelines treating crack cocaine and powder cocaine differently. See United States v. Burgos, 94 F.3d 849, 8760877 (4th Cir. 1996) (en banc); United States v. Byse, 28 F.3d 1165, 1168-1171 (11th Cir. 1994); United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994); United States v. Angulo-Lopez, 7 F.3d 1506, 1508-1509 (10th Cir. 1993); and United States v. Lawrence, 951 F.2d 751, 753-756 (7th Cir. 1991).

The rational basis test is applied to other sentencing disparities resulting from the application of state and federal penal statutes as well. For example, the First Circuit applied the rational basis test to the defendant's claim that a federal statute imposing a mandatory minimum based on the defendant's prior state-court conviction of cocaine possession. United States v. Fink, 499 F.3d 81, 87 (1st Cir. 2007). The defendant argued that the statute resulted in disparate sentences based on the state in which the prior conviction occurred and, therefore, violated equal protection guarantees. Rejecting that claim, the First Circuit concluded that "[i]t was entirely rational' for Congress to structure the sentence-enhancement statute as it did." Id. Other courts have reached the same conclusion with respect to similar claims. *See* United States v. Houston, 547 F.2d 104, 107 (9th Cir. 1976); United States v. Burton, 475 F.2d 469, 470 (8th Cir. 1973).

More importantly, courts uniformly apply the rational basis test to sentencing disparities that result from prospective application of newly enacted penal statutes, or amendment or repeal of existing penal statutes. *See* Hunt, 57 F.3d at 1335 (prospective application of statute creating life without parole as a sentencing alternative to the death penalty); Frazier v. Manson, 703 F.2d 30 (2nd Cir. 1983) (prospective application of statute providing for more good time credits per year); McQueary v. Blodgett, 924 F.2d 829 (9th Cir. 1990) (prospective application of Washington Sentencing Reform Act). For example, in Virginia, the

repeal of parts of a DWI habitual offender statute created disparate sentencing of habitual DWI offenders based solely on whether the offense was committed before or after the effective date of the repeal. Lilly v. Commonwealth, 50 Va.App. 173, 181-183, 647 S.E. 2d 517, 521-522 (Ct.App. 2007). In finding no equal protection violation, the Virginia court applied the rational basis test. Id. The court observed that the underlying premise of the defendant's equal protection claim was that "no substantive amendments could ever be enacted to recidivism statutes because such amendments would, of necessity, divide offenders into before and after categories." Id. at 182, 647 S.E.2d at 522. The court further observed that the logical extension of the defendant's claim was that "all statutory changes are irrational because they treat people differently on no other basis than the fortuity of time." Even the defendant recognized the absurdity of such an extension of logic and disavowed any such claim. Id.

Here, however, that is exactly the claim Petitioner makes. Yet, if strict scrutiny applies because the repeal statute affects Petitioner's interests in life and liberty, then strict scrutiny would necessarily apply to every penal statute, newly enacted, amended or repealed. Such an analysis ignores the Legislature's policy making authority, as well as the State's compelling interest in furthering the penological goals of retribution and deterrence. It would essentially transform the courts into super-legislative bodies with the power to override the Legislature's

policy choices. This Court, as the Supreme Court and every federal and state court to address this issue have done, should reject such an approach and, instead, apply the rational basis test in reviewing equal protection challenges to penal statutes.

As discussed above, the Legislature's decision to apply the repeal statute prospectively to aggravated first degree murders committed after July 1, 2009, bears a rational relation to legitimate state interests.

It is perfectly proper for the Legislature to create a new sentencing procedure which operates prospectively only. Despite the disparity created by rendering different sentences after an admittedly arbitrarily chosen date, prospective application of such a statute does not violate equal protection principles, because of the legitimate public purpose of assuring that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.

Gilchrist, 133 Cal.App. 3d at 45 (internal quotation and citation omitted).

Petitioner claims that "New Mexico's Equal Protection Clause, being Article II, Section 18 of the Constitution of New Mexico, provides something beyond that already afforded by the general language of the Equal Protection Clause of the United States Constitution." Pet. at 7. In so doing, Petitioner relies on the decision in New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841. However, Johnson does not hold that Article II, § 18 provides broader protection in all contexts than the equal protection clause of the Fourteenth Amendment. Rather, in Johnson the Court simply recognized that the Equal Rights Amendment to Article II, § 18 establishes distinct state characteristics

justifying broader protection against gender-based discrimination than is provided under the Fourteenth Amendment. Johnson, 1999-NMSC-005, at ¶ 29.

Petitioner's equal protection claim does not involve a claim of gender-based discrimination and, therefore, does not benefit from the Equal Rights Amendment and the broader protection it provides. *See State v. Lynch*, 2003-NMSC-020, ¶ 13, 134 N.M. 139, 74 P.3d 73.

Therefore, under the interstitial approach to state constitutional claims, Petitioner must establish reasons for departing from the federal analysis. *Id.* Petitioner has not met that burden. Indeed, no such reason exists. In New Mexico, as in every other state, "the Legislature is invested with plenary legislative power, and the defining of crime and prescribing punishment therefor are legislative functions." Thompson, 57 N.M. at 465, 260 P.2d at 374. It is that power, and the legitimate penological interests the Legislature addresses through its exercise of that power, that forms the basis for application of the rational basis test to equal protection claims based on sentencing disparities created by penal statutes. Therefore, no reason exists for recognizing broader protection from sentencing disparities created by penal statutes under Article II, § 18 than is provided by the Fourteenth Amendment.

- C. The statute prospectively repealing the death penalty is not a bill of attainder prohibited under the federal and state constitutions nor a special law prohibited under the state constitution.

1
2 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**
3 **February 4, 2011**

4 **NO. 32,744**

5 **MICHAEL PAUL ASTORGA,**

FILED FEB 07 2011

6 Petitioner,

7 v.

8 **HON. NEIL C. CANDELARIA, District**
9 **Judge, Second Judicial District, County**
10 **of Bernalillo, State of New Mexico,**

11 and

12 **STATE OF NEW MEXICO, by and through**
13 **its Second Judicial District Attorney, KARI**
14 **E. BRANDENBURG,**

15 Real Party in Interest.

16 **ORDER**

17
18 WHEREAS, this matter came on for consideration by the Court upon
19 petition for writ of superintending control, and the Court having considered said
20 petition and response, and being sufficiently advised, Chief Justice Charles W.
21 Daniels, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard
22 C. Bosson, and Justice Edward L. Chávez concurring;

23 NOW, THEREFORE, IT IS ORDERED that the petition hereby is denied;

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IT IS FURTHER ORDERED that the Stay issued on December 10, 2010 hereby is lifted.

IT IS SO ORDERED.

WITNESS, The Hon. Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of February, 2011.

(SEAL)

Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

Attachment B

Excerpt of *State v. Rizzo*, 303 Conn. 71 (2011)

H

Supreme Court of Connecticut.
STATE of Connecticut

v.

Todd RIZZO.

No. 17527.

Argued Oct. 22, 2010.

Decided Nov. 29, 2011.

[Parts I – VIII of Decision Omitted]

IX

[76] The defendant's final claim is that the death penalty, in general, constitutes cruel and unusual punishment in violation of the state constitution. Although we previously have rejected this claim; see *State v. Ross*, supra, 230 Conn. at 249–52, 646 A.2d 1318; see also *State v. Webb*, supra, 238 Conn. at 406, 680 A.2d 147; the defendant requests that we reconsider it in light of subsequent developments in law and policy.^{FN81} We accept the defendant's invitation to revisit this issue, but again disagree that the death penalty violates the state constitution.^{FN82}

^{FN81}. In advancing this claim, the defendant cites to extra-record reference materials as evidence of contemporary societal norms to advocate for a new constitutional rule rather than, as in parts I, IV and VII of his brief, to attempt to readjudicate this particular case on appeal. See footnotes 16, 63 and 76 of this opinion. We have in the past permitted citation to such evidence in this context. See *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 295 Conn. 240, 310 n. 56, 990 A.2d 206 (2010) (considering scientific studies in the context of the sixth *Geisler* factor, although not part of the trial court record"); see also *Moore v. Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (legislative facts, that is, facts that "help determine the content of law and policy," are subject to judicial notice); E. Margolis, "Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate

Briefs," 34 U.S.F. L.Rev. 214 (2000) (opining that it is appropriate to introduce nonlegal material in support of policy arguments at the appellate stage of litigation").

^{FN82}. The defendant also argues that the death penalty, per se, constitutes a violation of the eighth amendment to the United States constitution. Clearly, we are bound by precedents of the United States Supreme Court holding to the contrary. See, e.g., *Gregg v. Georgia*, supra, 428 U.S. at 168–87, 96 S.Ct. 2909. It is the prerogative of that court alone to overrule its own precedents, even if subsequent decisions or developments may appear to have significantly undermined the rationale for an earlier holding. See *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001).

*185 In *Ross*, the defendant, like the defendant here, raised a general challenge pursuant to the state constitution to the validity of the death penalty under any and all circumstances. After acknowledging that article first, §§ 8 and 9, of the constitution of Connecticut protects against cruel and unusual punishment independently of the eighth amendment to the United States constitution, we conducted an analysis pursuant to the six factor framework of **1165 *State v. Geisler*, supra, 222 Conn. at 684–86, 610 A.2d 1225, to determine whether the death penalty, per se, was offensive to those state constitutional provisions. We concluded that it was not.^{FN83} *State v. Ross*, supra, 230 Conn. at 249–52, 646 A.2d 1318.

^{FN83}. In *State v. Ross*, supra, 230 Conn. at 183, 286, 646 A.2d 1318, four members of a five judge panel voted to sustain the constitutionality of the death penalty, with Justice Berdon in dissent.

We initially determined that five of the *Geisler* factors—(1) the text of the constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; and (5) historical insights into the intent of our constitutional forebearers—did not support the

defendant's claim that the death penalty should be declared unconstitutionally unacceptable on its face. Id., at 249, 646 A.2d 1318. We explained: "In article first, § 8, and article first, § 19, our state constitution makes repeated textual references to capital offenses and thus expressly sustains the constitutional validity of such a penalty in appropriate circumstances. Connecticut case law has recognized the facial constitutionality of the death penalty under the eighth and fourteenth amendments to the federal constitution. See, e.g., State v. Davis, 158 Conn. 341, 358, 260 A.2d 587 (1969), vacated and remanded on other grounds, *186/[Davis v. Connecticut] 408 U.S. 935, 92 S.Ct. 2856, 33 L.Ed.2d 750 (1972). Federal constitutional law does not forbid such a statute outright. Gregg v. Georgia, supra, 428 U.S. 153 [96 S.Ct. 2909]. Courts in the overwhelming majority of our sister states have rejected facial challenges to the death penalty under their state constitutions. Finally, Connecticut's history has included a death penalty since 1650, when it was incorporated into Ludlow's Code ... and such a penalty was considered constitutional at the time of the adoption of the constitution of 1818." (Citation omitted.) State v. Ross, supra, 230 Conn. at 249–50, 646 A.2d 1318.

We thereafter considered the sixth Gelsler factor, contemporary understandings of applicable economic and sociological norms, and we disagreed with the defendant's argument "that the death penalty is so inherently cruel and so lacking in moral and sociological justification that it is unconstitutional on its face because it is fundamentally offensive to evolving standards of human decency." Id., at 251, 646 A.2d 1318. We reasoned that community standards of acceptable legislative policy choices necessarily were reflected in our constitutional text, our history and the teachings of the jurisprudence of other state and federal courts. Id. We found particularly compelling the fact that, in the ten years following the United States Supreme Court's invalidation of all of the states' capital punishment schemes due to their failure to channel properly the sentencer's discretion, thirty-seven states had passed new death penalty legislation designed to comply with the court's constitutional directives. Id. We concluded that, given that circumstance, "the probability that the legislature of each state accurately reflects its community's standards approaches certainty." (Internal quotation marks omitted.) Id.

We then emphasized that, although the death

penalty itself is not cruel and unusual punishment contrary to the state constitution, the imposition of the penalty *187 must conform to constitutional constraints. Specifically, we held that "the due process clauses of our state constitution incorporate the principles underlying a constitutionally permissible death penalty statute that the United States Supreme Court has articulated in [its capital punishment jurisprudence]... These principles **1166 require, as a constitutional minimum, that a death penalty statute, on the one hand, must channel the discretion of the sentencing judge or jury so as to assure that the death penalty is being imposed consistently and reliably and, on the other hand, must permit the sentencing judge or jury to consider, as a mitigating factor, any aspect of the individual defendant's character or record as well as the circumstances of the particular offense." (Citations omitted.) Id., at 252, 646 A.2d 1318. We concluded that "[o]ur death penalty statute, § 53a-46a, meets these minimum state constitutional law requirements." Id.

Two years later, in State v. Webb, supra, 238 Conn. at 406, 680 A.2d 147, an en banc panel comprised entirely of members of this court ^{FN84} reaffirmed the holding of Ross recited herein, ^{FN85} and we since have repeated the holding on several occasions without elaboration. See State v. Colon, supra, 272 Conn. at 382–83, 864 A.2d 666; State v. Breton, supra, 264 Conn. at 417–18, 824 A.2d 778; State v. Reynolds, supra, 264 Conn. at 236–37, 836 A.2d 224; State v. Cobb, supra, 251 Conn. at 496–97, 743 A.2d 1. The defendant asks that we reconsider these holdings in light of the current legal and sociological landscape.

^{FN84}. In contrast, in State v. Ross, supra, 230 Conn. at 183, 646 A.2d 1318, the five judge panel that decided the appeal had been comprised of three members of this court and two Appellate Court judges sitting by designation.

^{FN85}. In State v. Webb, supra, 238 Conn. at 551, 680 A.2d 147, the vote sustaining the constitutionality of the death penalty was four to three, with Justices Berdon, Norcott and Katz in dissent.

[77] We agree with the defendant that, in determining whether a particular punishment is cruel and

unusual in violation of constitutional standards, we must “look beyond historical conceptions to the evolving standards *188 of decency that mark the progress of a maturing society.... This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” (Citations omitted; internal quotation marks omitted.) Graham v. Florida, — U.S. —, 130 S.Ct. 2011, 2021, 176 L.Ed.2d 825 (2010). Thus, it is appropriate to revisit our earlier holdings to examine what since has transpired. In so doing, however, we remain cognizant that our constitution contains explicit references to capital punishment; see Conn. Const., art. I, §§ 8 and 19; and, therefore, “expressly sustains the constitutional validity of such a penalty in appropriate circumstances.” State v. Ross, *supra*, 230 Conn. at 249–50, 646 A.2d 1318. The defendant’s claim must be evaluated against this clear textual backdrop.

We first consider developments in the capital punishment jurisprudence of the United States Supreme Court.^{FN86} In the years since Ross and Webb were decided, the United States Supreme Court has held that the death penalty is constitutionally impermissible for nonhomicide crimes against individuals; see Kennedy v. Louisiana, 554 U.S. 407, 413, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); and it has adopted categorical rules prohibiting the imposition of the death penalty for defendants who committed their crimes prior to the age of eighteen; see Roper v. Simmons, 543 U.S. 551, 568–71, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); or whose intellectual functioning is **1167 in a low range. See Atkins v. Virginia, 536 U.S. 304, 318–21, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). It remains settled federal law, however, that the *189 death penalty in general is constitutionally permissible. Baze v. Rees, 553 U.S. 35, 47, 61, 62 n. 7, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008); see also Gregg v. Georgia, *supra*, 428 U.S. at 177–78, 96 S.Ct. 2909.

^{FN86} We undertake, in essence, a partial Geisler analysis regarding what has occurred since 1994, because our constitutional text and history remain the same, and this court repeatedly has sustained the constitutionality of the death penalty generally and our death penalty statutes in particular. Ac-

ordingly, our focus is on recent federal and state jurisprudence and contemporary economic and sociological norms.

Notably, these federal constitutional developments did not change the law in Connecticut, because our legislature had acted ahead of the United States Supreme Court to prohibit executions of persons with mental retardation. See General Statutes § 53a-46a (h)(2), as amended by Public Acts 2001, No. 01-151, § 2. Moreover, from the time they were adopted in 1973, our modern death penalty statutes barred executions of those who committed their capital crimes when they were under eighteen years old; see Public Acts 1973, No. 73-137, § 4; and did not authorize the death penalty for any crime not involving the death of a victim.^{FN87} See Public Act 73-137, § 3. We are not convinced, therefore, that the recent jurisprudence of the United States Supreme Court suggests that Connecticut, by retaining the death penalty, is out of step with national societal mores. To the contrary, over time, the national landscape has become more closely aligned with Connecticut. Additionally, we do not discern a fundamental disapproval of the death penalty in general from that court’s ongoing shaping of the categories of offenses or offenders to which it should apply. Rather, such refinements are consistent with the long-standing principle espoused by the United States Supreme Court that society’s ultimate sanction ought to be reserved for the most egregious and culpable of offenders.

^{FN87} When originally enacted, § 53a-54b authorized a capital felony conviction for a nonhomicide offense that, nevertheless, contributed to the death of a person. See Public Act 73-137, § 3(6) (identifying as capital felony illegal sale, for economic gain, of cocaine, heroin or methadone to person who dies as direct result of use of such cocaine, heroin or methadone). This provision was eliminated in 2001. See Public Act No. 01-151, § 3. Since then, Connecticut’s statutorily enumerated capital felonies have included only various types of murders.

*190 We turn to our sister states. It is true that, in the intervening years since our decisions in Ross and Webb, the number of states in which the death penalty is an available punishment has declined slightly from the thirty-seven that authorized it in

1994. Specifically, the legislatures of three states—Illinois, New Jersey and New Mexico—have voted to abolish the death penalty.^{FN88} Although it is significant that these states have chosen to abandon capital punishment, the decision to do so in each instance was based on a variety of public policy determinations made by legislators and governors, and did not result from the constitutional command of a court. See, e.g., State v. Ramseur, 106 N.J. 123, 167–97, 524 A.2d 188 (1987) (rejecting claim that death penalty per se was **1168 violative of state constitution); State v. Rondeau, 89 N.M. 408, 412, 553 P.2d 688 (1976) (same).

FN88. Moreover, in People v. LaValle, 3 N.Y.3d 88, 120, 817 N.E.2d 341, 783 N.Y.S.2d 485 (2004), the New York Court of Appeals held that a jury deadlock instruction prescribed by New York's death penalty statute violated that state's constitution. Because state legislators have not cured the statutory defect, New York effectively has been without a death penalty since 2004.

Notably, the New Mexico ban is prospective only and no clemency has been granted to convicted capital offenders, leaving that state's existing death row intact. Given that circumstance, it is unlikely that the New Mexico legislature was convinced that the death penalty is intolerable under any and all circumstances. See Atkins v. Virginia, supra, 536 U.S. at 342, 122 S.Ct. 2242 (Scalia, J., dissenting) (legislation that abolished death penalty for persons with mental retardation prospectively only "is not a statement of absolute moral repugnance, but one of current preference between two [constitutionally] tolerable approaches").

More importantly, at this point in time, a strong majority of jurisdictions—thirty-four states, the federal government and the military—still authorize the death penalty, while only sixteen states do not. See Death Penalty Information Center, "Facts about the Death Penalty," (updated November 17, 2011), p. 1, available at http://www.deathpenaltyinfo.org/documents/Fact_Sheet.pdf (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court *191 clerk's office). Simply put, the

recent actions of a handful of states cannot reasonably be characterized as the type of "dramatic shift in the state legislative landscape"; Atkins v. Virginia, supra, 536 U.S. at 310, 122 S.Ct. 2242; that would call our decisions in Ross and Webb into question. Compare id., at 313–15, 122 S.Ct. 2242 (holding unconstitutional executions of persons with mental retardation, when thirty states had disallowed them); Kennedy v. Louisiana, supra, 554 U.S. at 423, 128 S.Ct. 2641 (same, for crime of child rape, when forty-four states had disallowed them); Roper v. Simmons, supra, 543 U.S. at 564–65, 125 S.Ct. 1183 (same, as to executions of juveniles, when thirty states, including five over prior fifteen years, had disallowed them); Enmund v. Florida, 458 U.S. 782, 788–92, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (same, as to executions of codefendants who did not kill, attempt to kill or intend to kill, when forty-two states had disallowed them); Coker v. Georgia, 433 U.S. 584, 595–96, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (same, for rape of adult woman, where forty-nine jurisdictions had disallowed them).

Although "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"; (internal quotation marks omitted) Atkins v. Virginia, supra, 536 U.S. at 312, 122 S.Ct. 2242; in assessing whether a punishment is constitutionally sound, it also is appropriate for us to consider what is occurring in actual practice. For example, in Graham v. Florida, supra, 130 S.Ct. at 2024, in holding that the sentence of life imprisonment without the possibility of parole was cruel and unusual punishment for a juvenile who had committed a nonhomicide offense, the United States Supreme Court considered, inter alia, that nationwide, only 123 people were serving such sentences in only eleven jurisdictions. In contrast, as to the death penalty generally, as of January 1, 2011, there were 3251 inmates held on death row nationwide by thirty-six *192 states,^{FN89} the federal government and the military. See Death Penalty Information Center, "Facts about the Death Penalty," supra, p. 2. Unlike the United States Supreme Court in Graham, therefore, we cannot conclude that the punishment of death has become a rarity imposed only in limited portions of the nation.

FN89. This statistic includes two inmates in New Mexico who remain on death row despite that state's repeal of the death penalty

because the repeal, by its terms, is prospective only. It also includes sixteen Illinois inmates who were on death row in January of 2011, but were subsequently granted clemency by that state's governor when the repeal of the death penalty in Illinois took effect on July 1, 2011, bringing the number of inmates held on death row nationwide to 3235 in thirty-five states.

The defendant directs us to the fact that, despite the large number of inmates on death row, the number of executions actually carried out over the past decade generally has declined gradually, hitting a low point in 2008 before rising again.^{FN90} The numbers remain substantially higher, however, than those in the ten years preceding**1169 our decision in Ross.^{FN91} In addition, the decrease in 2007 and 2008 likely was attributable in part to moratoria imposed in 2007 following the United States Supreme Court's grant of certification in Baze v. Rees, *supra*, 553 U.S. at 41, 128 S.Ct. 1520, an appeal in which it was argued, unsuccessfully, that the risk of error in administration of lethal injection, the method of execution utilized by most death penalty states, rendered that form of capital punishment unconstitutional. Also a factor impeding executions in recent years is a shortage of thiopental sodium, which is used in lethal injections, as well as *193 moratoria imposed in various states while new lethal injection procedures are promulgated and challenged. See Death Penalty Information Center, "Death Penalty in Flux," available at <http://www.deathpenaltyinfo.org/death-penalty-flux> (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office); Death Penalty Information Center, "Lethal Injection," (2011), available at <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision> (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office). In light of the foregoing, we are hesitant to assume, as the defendant invites us to do, that declines in actual execution rates are attributable to decreased public support for the death penalty.^{FN92}

^{FN90}. The numbers of executions carried out, nationwide, over the previous sixteen years, are as follows: 1994-31; 1995-56; 1996-45; 1997-74; 1998-68; 1999-98; 2000-85; 2001-66; 2002-71; 2003-65;

2004-59; 2005-60; 2006-53; 2007-42; 2008-37; 2009-52; 2010-46. See Death Penalty Information Center, "Facts about the Death Penalty," *supra*, p. 1. As of October 21, 2011, 38 executions have taken place. See *id.*

^{FN91}. The numbers of executions carried out, nationwide, in the decade preceding Ross were, as follows: 1983-5; 1984-21; 1985-18; 1986-18; 1987-25; 1988-11; 1989-16; 1990-23; 1991-14; 1992-31; 1993-38. See Death Penalty Information Center, "Facts about the Death Penalty," *supra*, p. 1.

^{FN92}. Moreover, although the pace of executions has slowed in recent years, they still occur at a rate substantially higher than that typically considered by the United States Supreme Court to evidence a dearth of public support for a particular punishment. See, e.g., Kennedy v. Louisiana, *supra*, 554 U.S. at 433, 128 S.Ct. 2641 (no executions of child rapists since 1964, or for any nonhomicide offense since 1963); Roper v. Simmons, *supra*, 543 U.S. at 564-65, 125 S.Ct. 1183 (only three executions of juvenile offenders in ten year period); Atkins v. Virginia, *supra*, 536 U.S. at 316, 122 S.Ct. 2242 (only five executions of defendants with mental retardation in thirteen year period); Enmund v. Florida, *supra*, 458 U.S. at 794, 102 S.Ct. 3368 (only six executions of nontriggerman felony murderers between 1954 and 1982).

We recognize that imposition of new death sentences also has declined substantially over the past decade, from 224 in 2000 to 112 in 2010. Death Penalty Information Center, "Facts about the Death Penalty," *supra*, at p. 3. Various reasons have been posited for the decline, however, including: the high costs of the death penalty at a time when state budgets are strained from a weak economy; publicity about convictions overturned due to DNA evidence; a significant drop in rates of violent crime and murder; improved legal representation for capital defendants, including the greater use of mitigation specialists; and the increasingly available option *194 for prosecutors to seek life sentences without the possibility of

parole.^{FN93} Although some of these explanations**1170 suggest declining public support for the death penalty because it offends contemporary standards of decency and morality, others decidedly do not. Because of the ambiguity underlying the decline in new death sentences, that circumstance does not provide compelling support for abandoning our decisions in *Ross* and *Webb*.^{FN94}

^{FN93}. See Death Penalty Information Center, "The Death Penalty in 2010: Year End Report," (December, 2010), available at [http://www.deathpenaltyinfo.org/documents/2010 Year End-Final.pdf](http://www.deathpenaltyinfo.org/documents/2010%20Year%20End-Final.pdf) (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office); N. Lewis, "Death Sentences Decline, And Experts Offer Reasons," N.Y. Times, December 15, 2006, p. A28.

^{FN94}. Indeed, declining imposition of capital punishment may indicate that the death penalty is being employed precisely as was intended, to punish only the very worst of society's criminals, and only after a vigorous legal process has ensured that the defendant has been found guilty after a fair trial with demanding procedural safeguards. As the United States Supreme Court has observed, "the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, [it] ... may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, *supra*, 428 U.S. at 182, 96 S.Ct. 2909.

The defendant points to public opinion polls as support for his claim of waning societal support for the death penalty. The most recent polling data indicate, however, that public support for the death penalty in Connecticut remains strong.^{FN95} According to a Quinnipiac University poll released in March, 2011, 67 percent of Connecticut voters supported the death penalty, while only 28 percent were opposed to it.^{FN96} D. Schwartz, Quinnipiac*195 University Poll (March 10, 2011), available at http://www.quinnipiac.edu/images/polling/ct/ct_03102011.doc (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office). When

asked to choose between alternative penalties for first degree murder, 48 percent opted for the death penalty, while 43 percent chose life in prison with no chance for parole. *Id.* On both measures, the percentages favoring the death penalty have increased each year since 2007. *Id.* Although we recognize the weaknesses inherent in public opinion polls as objective measures of the popular psyche, we mention this data to refute the defendant's contention that it lends support to his constitutional claim.

^{FN95}. The defendant filed his initial brief in this appeal in 2008, when support for the penalty appeared somewhat weaker, and he referred to an earlier Quinnipiac poll reflecting that circumstance.

^{FN96}. The views of Connecticut residents are consistent with those held nationally. A 2010 Gallup poll showed 64 percent of Americans in favor of the death penalty and 29 percent in opposition to it. See Gallup, "In U.S., 64% Support Death Penalty in Cases of Murder," (November 8, 2010), available at <http://www.gallup.com/poll/144284/Support-Death-Penalty-CasesMurder.aspx> (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office).

The defendant also argues that this court should look to practices in some other nations, or to a resolution of the United Nations calling for the abolition of capital punishment, to determine whether the death penalty offends contemporary sociological norms in Connecticut. In its eighth amendment jurisprudence, the United States Supreme Court at times has referenced international norms as support for its own determinations, while at the same time making clear that the opinions prevalent in other nations could never control over a domestic legislative climate running decidedly counter to such opinions. See *Graham v. Florida*, *supra*, 130 S.Ct. at 2033, (noting that punishment at issue had been rejected in all other nations, but emphasizing that "[t]his observation does not control our decision [and that] judgments of other nations and the international community are not dispositive as to the meaning of the [e]ighth [a]mendment"); *Roper v. Simmons*, *supra*, 543 U.S. at 578, 125 S.Ct. 1183 ("[t]he opinion of the world **1171 community [which universally ^{FN97} had

ceased to give official sanction to the *196 juvenile death penalty], while not controlling our outcome, does provide respected and significant *confirmation for our own conclusions*" [emphasis added]).

FN97. Unlike the punishments at issue in *Graham* and *Roper*, capital punishment in general has not lost the support of the entire world community. According to Amnesty International, ninety-six countries have abolished the death penalty for all crimes and nine have abolished it for all but "exceptional crimes," thirty-four countries retain the death penalty but have not executed anyone in the last ten years, and fifty-eight countries retain the death penalty and, apparently, have employed it recently. See Amnesty International, "Abolitionist and Retentionist Countries," available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office).

In *State v. Allen*, 289 Conn. 550, 585, 958 A.2d 1214 (2008), we took a similar view of the relevance of international norms in a case involving a claim of an unconstitutional sentence. In rejecting the defendant's argument that life in prison with no possibility of release for a juvenile convicted of capital felony and murder was cruel and unusual punishment in violation of the eighth amendment, we recognized that the overwhelming majority of countries around the world had rejected that approach and that that circumstance was constitutionally relevant. We agreed, moreover, that the large number of juveniles serving life sentences in the United States raised troubling questions. *Id.* We ultimately concluded, however, that the overwhelming weight of authority from courts in this country that the practice was constitutionally sound, strong indications of approval from the United States Supreme Court and no evident trend away from imposing serious adult criminal liability upon juvenile offenders compelled us to defer to the legislative process on what ultimately is a public policy determination. *Id.*, at 585-86, 958 A.2d 1214. We conclude similarly today that international norms cannot take precedence over a domestic legal climate in which capital punishment retains strong legislative and judicial support.

As part of his constitutional claim, the defendant argues that capital punishment is not serving legitimate penological goals of deterrence, incapacitation or rehabilitation.*197 9998FN;B10099FN;B101100

FN98. The defendant deemphasizes retribution, which is recognized as a constitutionally legitimate purpose of punishment. *Graham v. Florida*, supra, 130 S.Ct. at 2028. In explaining her veto of legislation intended to repeal the death penalty, then Governor M. Jodi Rell relied expressly on this justification, among others. See *Governor's Veto Message for Public Act 09-107 Bill Notification Release No. 19 (June 5, 2009)*, available at <http://www.ct.gov/governorrell/cwp/view.asp?A=1716&Q=441210> (last visited November 18, 2011) (copy contained in the file of this case in the Supreme Court clerk's office).

FN99. The defendant also includes lengthy quotes from the opinions of dissenting justices in capital cases, which express views similar to those reflected in the commission and interest group reports. He further observes that death row inmates have been exonerated in other jurisdictions, but makes no suggestion that any person on Connecticut's death row, presently or previously, was convicted wrongfully.

FN100. As the Supreme Court of New Jersey observed when upholding that state's death penalty against a general constitutional challenge, "[t]he 'contemporary standard of decency' against which the death penalty must be tested ... is that of the community, not that of its scientists, penologists, or jurists." *State v. Ramsey*, supra, 106 N.J. at 171, 524 A.2d 188.

One final matter raised by the defendant merits our consideration. In May, 2009, following the filing of the defendant's initial brief, the General Assembly passed No. 09-107 of the 2009 Public Acts (P.A. 09-107), which was intended to repeal the death penalty for crimes committed after the passage of the act. On June 5, 2009, however, P.A. 09-107 was vetoed by the governor, and the legislature did not thereafter

muster the two-thirds vote necessary to override the governor's veto.^{FN101} *199 Accordingly, P.A. 09-107 failed to become law. Similar legislation was introduced in 2011 and voted out of the judiciary committee, but died before making it to **1173 the floor for a full vote in either chamber. Revised Senate Bill No. 1035, 2011 Sess.

FN101. The repeal legislation originally had passed in the House of Representatives with ninety members voting in favor of it, fifty-six members voting against it and five members abstaining. The vote had been closer in the Senate, with nineteen members voting in favor of the legislation and seventeen voting against it.

In support of this claim, the defendant cites extensively, but selectively, to the portions of the legislative history of P.A. 09-107 in which some supporters of repeal expressed their beliefs that the death penalty is morally wrong, arbitrarily imposed or penologically ineffective. He ignores or discounts other portions of the legislative history that suggest that the attempted repeal was motivated by practical rather than moral concerns, as well as the portions reflecting substantial opposition to the repeal.

Following the aborted passage of P.A. 09-107, the defendant submitted his reply brief. He argues that the legislative repeal of the death penalty, although subsequently vetoed by the governor, evidences a powerful societal repudiation of capital punishment in Connecticut that should compel this court to conclude that such punishment violates the state constitution. We are not persuaded.^{FN102}

FN102. The defendant also argues that the unsuccessful repeal attempt deprives the death penalty of the legislative authorization necessary for its constitutionality, and that "[t]he state constitution does not empower the [g]overnor to authorize the death penalty after its repudiation by the General Assembly...." Obviously, all of our current death penalty legislation was enacted via the process specified in our constitution, which requires both legislative and gubernatorial ap-

proval, and subsequently has been upheld by this court against numerous constitutional challenges. The defendant provides no direct support for the proposition that a legislature's unsuccessful repeal attempt somehow vitiates a law that was enacted constitutionally by a previous legislature and governor, and we are not aware of any. Moreover, to the extent the defendant raises a new claim as to purported constitutional limitations on the governor's authority to veto death penalty legislation, a claim to which the state has had no opportunity to reply, we need not address his arguments. *SS-II, LLC v. Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009) (parties may not raise new claims in reply brief). In any event, the defendant's arguments in this regard are meritless.

The governor, like our legislators, is an elected representative of the people of the state. Additionally, executive approval or veto of legislation is an integral part of the legislative process; see Conn. Const., art. IV, § 15; *200 and it is axiomatic that when the governor exercises this power, he or she is acting in a substantive legislative role. See *Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998); *Bagley v. Blagojevich*, 646 F.3d 378 (7th Cir.2011); *Baraka v. McGreevey*, 481 F.3d 187, 197 (3d Cir.), cert. denied, 552 U.S. 1021, 128 S.Ct. 612, 169 L.Ed.2d 393 (2007); *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 213 (1st Cir.2005); *Butts v. Dept. of Housing Preservation & Development*, 990 F.2d 1397, 1406 (2d Cir.1993); see also I N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* (7th Ed. 2010) § 16:1, p. 729 ("All American [c]onstitutions give to the chief executive a formal and official role in the legislative process, in addition to the important influence he or she usually wields over the legislative process by reason of political power and leadership. The [c]onstitutions of the United States and of nearly every state require as an essential step in enactment that bills which have passed both houses shall be presented to the executive." [Emphasis added.]); 73 Am.Jur.2d 254, Statutes § 32 (2001) ("[i]n passing on laws that are submitted for approval, the executive is regarded as a component part of the lawmaking body, and as engaged in the performance of a legislative, rather than an executive duty" [emphasis added]). Thus, just as a governor's approval of legislation may provide evi-

dence of the motivations underlying that legislation; Perez v. Rent A-Center, Inc., 186 N.J. 188, 215, 892 A.2d 1255 (2006) (crediting governor's signing statement as evidence of statute's meaning), cert. denied, 549 U.S. 1115, 127 S.Ct. 984, 166 L.Ed.2d 710 (2007); Rangolan v. Nassau, 96 N.Y.2d 42, 49, 749 N.E.2d 178, 725 N.Y.S.2d 611 (2001) (same); the absence of approval, which the legislature thereafter is unable to override, signifies that public support for the failed legislation was tenuous.

Accordingly, we are unable to accept the premise underlying all of the defendant's various arguments as *201 to the import of **1174 P.A. 09-107, which, generally stated, is that the legislature's vote establishes definitively a lack of public support for the death penalty and, therefore, the governor's veto of that act thwarted the public will. Rather, a more plausible view is that "[t]he [governor] is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the [governor] elected by all the people is rather more representative of them all than are the members of either body of the [l]egislature whose constituencies are local and not [statewide]...." (Internal quotation marks omitted.) Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 948, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

In light of the foregoing, we disagree that we properly may discern contemporary community standards on the basis of a "truncated [product] of the legislative process"; (Internal quotation marks omitted) Wilson v. Eu, 1 Cal.4th 707, 727, 823 P.2d 545, 4 Cal.Rptr.2d 379 (1992); that ultimately failed to gain *all* of the constitutional approvals necessary to become the binding law of this state. Cf. Kennedy v. Louisiana, *supra*, 554 U.S. at 431, 128 S.Ct. 2641 (declining to discern contemporary norms based on proposed legislation). Simply put, "[t]he [g]overnor is a part of the legislative process and a veto renders a legislative action as if it had not occurred." Washington State Legislature v. Lowry, 131 Wash.2d 309, 330, 931 P.2d 885 (1997).

We conclude that the death penalty, as a general matter, does not violate the state constitution. Accordingly, we reaffirm our earlier holdings to that effect in State v. Ross, *supra*, 230 Conn. at 249-52, 646 A.2d 1318, and State v. Webb, *supra*, 238 Conn. at 406, 680 A.2d 147.

The judgment is affirmed.

[Concurring and Dissenting Opinions Omitted]