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TO: Members of the Wyoming Legislature

FROM: The American Civil Liberties Union of Wyoming

DATE: Feb. 11, 2020

RE: The Constitutionality of Wyoming's Death Penalty Laws

The ACLU of Wyoming believes that the state's death penalty laws violate both the United States and Wyoming Constitutions and we support the legislative efforts to repeal capital punishment in the state.

Due to the unique and irreversible nature of ending a person's life, death penalty statutes must satisfy complex legal requirements in order to remain constitutional. Over the years, courts at both the federal and state levels have regularly held that these statutes can easily violate our nation's prohibition against cruel and unusual punishments. In 1972, the United States Supreme Court went so far as to strike down every death penalty statute in the country after finding that they all violated both the Eighth and Fourteenth Amendments.¹

Following that ruling, the Wyoming legislature passed a new capital punishment scheme to try to cure the constitutional inadequacies in its previous law. However, in 1977, Wyoming's Supreme Court found that this new scheme was also unconstitutional in that it still did not properly protect defendants against cruel and unusual punishments.² These cases show that for any death penalty statute to be constitutional, it must comply with very precise constitutional rules.

Of these constitutional requirements, none is more important than the prohibition against punishments that are imposed in an "arbitrary and unpredictable fashion[.]"³ Inherent in this prohibition against arbitrary enforcement, is the idea that the death penalty also cannot be enforced in a racially

¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

² *Kennedy v. State*, 559 P.2d 1014 (Wyo. 1977).

³ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

biased manner.⁴ If capital punishment is imposed in an arbitrary or discriminatory manner, it ceases to serve the death penalty’s purposes of “retribution and deterrence” and must be found unconstitutional.⁵ Unfortunately, there is ample evidence that Wyoming’s death penalty laws are being enforced in such a manner and cannot survive judicial scrutiny.

Numerous studies have investigated the racial bias inherent in the death penalty and have identified a disturbing correlation between race and the likelihood that the death penalty will be sought and imposed. For instance, in 2015 a Connecticut Supreme Court justice concluded that “[a]ll of the meta-analyses, and all of the major, multijurisdictional primary studies, have concluded, after subjecting evidence of racial disparities to advanced multivariate statistical analysis, that offenders who murder non-Hispanic white victims are more likely to be charged with a capital offense and/or sentenced to death than those who victimize members of racial minorities.”⁶

In addition to these larger studies and meta-analyses, there is substantial evidence that Wyoming enforces its death penalty laws in an arbitrary and discriminatory manner. Since 2006, fourteen capital cases have been brought by Wyoming prosecutors. Of those cases, 43% were brought against people of color despite the fact that these groups comprise only 16% of the state’s population.⁷ Similar examples of racially biased application has led to multiple recent decisions in which state courts have overturned death penalty sentencing schemes.⁸ A judicial review of Wyoming’s death penalty laws and their past application would likely raise similar constitutional issues.

⁴ See, e.g., *Tuilaepa v. California*, 512 U.S. 967 (1994) (guarding against bias or caprice in sentencing is “controlling objective” of court’s review); see also *Graham v. Collins*, 506 U.S. 461 (1993) (Thomas, J., concurring) (racial prejudice is “the paradigmatic capricious and irrational sentencing factor”); *Furman v. Georgia*, 408 U.S. 238 (1972) (Stewart, J., concurring) (“if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race”).

⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶ *State v. Santiago*, 318 Conn. 1 (Conn. 2015) (Norcutt, J., concurring).

⁷ ACLU of Wyoming, *Wyoming Death Penalty Forum*, YouTube (Jan. 15, 2020), <https://www.youtube.com/watch?v=bp4uyySLR2U&t=1s>

⁸ See *State v. Gregory*, 192 Wash.2d 1 (Wash. 2018) (overturning Washington state’s death penalty after examining data which showed that the “association between race and the death penalty is not attributed to random chance[.]”); *State v. Santiago*, 318 Conn. 1 (Conn. 2015) (summarizing evidence of racial bias in the state’s death penalty application and noting that “[w]e are not aware of any innocuous, nonracial factors that would plausibly account for these undisputed disparities in capital charging and sentencing rates.”).

Additionally, the Supreme Court’s previous rulings on capital punishment make clear that the scope of the Eighth Amendment’s prohibition of cruel and unusual punishments is “not static” but rather must be considered based on “the evolving standards of decency that mark the progress of a maturing society.”⁹ This evolving standard is especially relevant since Wyoming’s courts have not considered whether the state’s death penalty violates the Eighth Amendment since 2003.¹⁰ Since that time there have been significant changes in how the death penalty is viewed. These evolving standards must be taken into account when analyzing the constitutionality of Wyoming’s laws.¹¹

First, in recent years, the Supreme Court has consistently limited the situations in which capital punishment is permissible.¹² Also, since 2004, the number of states which have abolished the death penalty has nearly doubled; during that time, nine states have abolished the practice, bringing the total number of states that have done so to twenty-one. In addition to these actions by the state legislatures, governors in Oregon, Colorado, Pennsylvania, and California—the nation’s largest death row—have imposed moratoriums on executions, meaning that half of U.S. states have now either abolished the death penalty or halted executions. Even in the states where the death penalty still exists, since 2003 these states are sentencing defendants to death row and carrying out executions at historically low levels. For instance, new death sentences declined by 20.9% in 2019 from the already low 43 new death sentences imposed in 2018, and were down more than 89% from the peak of 310 or more new death sentences imposed each year from 1994 through 1996.¹³

This trend is reflected in a change in public opinion as well. In 2019, a Gallup poll found that for the first time since Gallup began asking the question in 1985, a majority of Americans now prefer life imprisonment rather than the death penalty

⁹ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁰ *Olsen v. State*, 67 P.3d 536 (Wyo. 2003).

¹¹ *State v. Gregory*, 192 Wash.2d 1 (Wash. 2018)(noting that prior decisions in Washington state court upholding the death penalty did not preclude the Court from ruling it unconstitutional as more information became available).

¹² See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty impermissible for nonhomicide crimes against individuals); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty impermissible for defendants who committed their crimes prior to age of eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty impermissible for defendants whose intellectual functioning is in low range).

¹³ *Id.*

as the appropriate punishment for defendants convicted of murder.¹⁴ According to this poll, 60% percent of Americans who were asked to choose whether the death penalty or life without possibility of parole “is the better penalty for murder” chose the life-sentencing option, while only 36% favored the death penalty.¹⁵

These figures clearly show that our nation’s courts, state legislatures, and public opinion are evolving to view the death penalty as an impermissibly cruel and unusual form of punishment. When combined with the racial bias discussed above, there can be little doubt that Wyoming’s death penalty laws violate the state and federal constitutions.

Due to the grave nature of the punishment, American courts have always applied a high degree of scrutiny to laws which permit the government to take a life. As more information becomes available about the arbitrary and discriminatory manner in which these laws are applied—and as societal standards regarding the death penalty continue to evolve—it becomes increasingly difficult for capital punishment laws to avoid violating the Eighth Amendment’s prohibition against cruel and unusual punishment. For these reasons, the ACLU of Wyoming encourages Wyoming legislators to repeal the death penalty in the 2020 Legislative Session.

Thank you.

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¹⁴ *Id.*

¹⁵ *Id.*