

**Testimony Submitted to the
New Hampshire House of
Representatives**

**Committee on Criminal Justice
and Public Safety**

**Hearings on HB 351 – Making the Killing of a
Person Under Age 18 a Capital Offense**

**February 7, 2017
Concord, New Hampshire**

**by Robert Brett Dunham
Executive Director
Death Penalty Information Center
Washington, D.C.**

INTRODUCTION

Mr. Chairman, Members of the Committee: I want to thank the Committee for providing me this opportunity to testify regarding House Bill 351 concerning expanding New Hampshire's death penalty statute to make the killing of a person under age 18 a capital offense.

My name is Robert Dunham. I am the Executive Director of the Death Penalty Information Center,¹ a non-profit organization that conducts research and publishes reports on issues related to capital punishment in the United States. I am a lawyer with more than two decades of experience litigating capital cases and served as an adjunct professor for 11 years at Villanova Law School in suburban Philadelphia before becoming DPIC's executive director two years ago.

The Center does not take a position for or against the death penalty. We serve as a resource for those who are interested in capital punishment. Our website is one of the most widely used by those seeking information on the death penalty. The Library of Congress has chosen it as part of its archive on this issue. Justices of the United States Supreme Court and state supreme courts have cited the website as an authoritative source of death penalty information. In my testimony, I hope to offer you a national perspective on the use of age as a determinant of whether an individual should be subject to the death penalty, and point out some potential problems with the bill that is under consideration by this Committee. I would be happy to answer any questions that members of the committee may have at any time, either today or by later correspondence.

¹ Death Penalty Information Center, 1015 18th Street, N.W., Washington, D.C. 20036. Phone: (202) 289-2275; web site: www.deathpenaltyinfo.org; email: rdunham@deathpenaltyinfo.org.

DEATH SENTENCING IN THE UNITED STATES

We are in the midst of a sea change in the public's view of capital punishment. Death penalty use fell to historic lows across the United States in 2016. The year saw the fewest new death sentences of any year in the modern era of capital punishment, since states began re-enacting death penalty statutes in 1973. New death sentences fell 39% from 2015's already 40-year low. Executions declined more than 25% to their lowest level in 25 years, and public opinion polls also measured support for capital punishment at a four-decade low.² In 1996, there were 315 death sentences imposed across the United States. In 2016, there were only 30—and only one anywhere in the Northeast. There were 98 executions in the U.S. in 1999; in 2016, there were 20, confined to Missouri and four southern states.³

To give a picture of the magnitude of the decline, consider that for every death sentence imposed in 2016, 10.5 had been imposed in 1996. Last year, only 13 states imposed any death sentences; 37 states and the District of Columbia did not. Texas, which imposed 48 death sentences in one year in 1999, has averaged 3 new death sentences over the past two years. Many historically “active” death penalty states, such as Georgia, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, didn't impose any death sentences at all.⁴

² See Death Penalty Information Center (DPIC), *The Death Penalty in 2016: Year End Report* (2016), available at <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>.

³ *Id.*; see also DPIC, *Executions by Year*, <http://www.deathpenaltyinfo.org/executions-year>.

⁴ *DPIC 2016 Year End Report*; see also DPIC, *Death Sentences in the United States From 1977 By State and By Year*, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977->

At a time in which states are moving away from capital punishment both in law⁵ and in practice, few states are contemplating broadening the reach of their death penalty statutes. This is particularly so in the Northeast, where in the period since the U.S. Supreme Court upheld new death penalty statutes in 1976, no state has ever executed a prisoner who did not voluntarily abandon his appellate rights. This bill to broaden the reach of New Hampshire's death penalty runs counter to these national and regional trends.

UNDER HOUSE BILL 351, NEW HAMPSHIRE WOULD USE THE BROADEST AGE-OF-VICTIM CRITERION FOR DEATH-ELIGIBLE OFFENSES OF ANY STATUTE IN THE COUNTRY.

Although the precatory language to House Bill 351 describes the proposal as “AN ACT making a person who knowingly causes the death of a child guilty of capital murder,” the bill actually would authorize the capital prosecution of a defendant whenever “he knowingly causes the death of ... [a]nother who is less than 18 years of age.” If enacted, New Hampshire would have the broadest age-of-victim criterion for death penalty eligibility in the United States.

[present](http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976); DPIC, *Number of Executions by State and Region Since 1976*, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

⁵ Seven states have legislatively or judicially abolished the death penalty in the last 12 years. See DPIC, *States With and Without the Death Penalty*, available at <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (**New York** (declared statute unconstitutional in 2004, then retroactively applied ruling to remaining death-row prisoner in 2007), **New Jersey** (legislatively abolished 2007), **New Mexico** (legislatively abolished in 2009), **Illinois** (legislatively abolished 2011), **Maryland** (legislatively abolished 2013), **Connecticut** (legislatively abolished 2012, declared unconstitutional by the state Supreme Court in 2015); and **Delaware** (statute declared unconstitutional in 2016). **Nebraska** also legislatively repealed the death penalty in 2015, but the repeal was overturned by referendum in November 2016).

Fifteen death penalty states currently include the murder of child as an aggravating circumstance that can subject a defendant to the death penalty, and four states that have since abolished the death penalty also had such aggravating circumstances. None, however, defines “child” as broadly as does HB351. (See Appendix A.)

The by far most common of the age-of-victim requirements, used by nine current or former death penalty states, is that the victim must be under age 12.⁶ The next most common age, used by four current or former death penalty states, is that the victim be under age 14.⁷ Two states require that the victim be younger than age 13 and one requires that the victim be younger than age 10.⁸ Only three states authorize capital prosecution based upon the victim being 14 years old or older.⁹

The typical justification for allowing the death penalty for the murder of a child is that children are a particularly vulnerable and defenseless class of victims, deserving of special protection under the law. However, as the use of this type of aggravator by other states shows, that reasoning is generally applied with respect to infants and children, not adolescents.

Moreover, the settings in which adolescents are murdered are materially different from those in which infants and young children die. Approximately 80%

⁶ Arkansas, Delaware (prior to judicial abolition), Florida, Illinois (prior to abolition), Indiana, Louisiana, Pennsylvania, South Carolina, and Tennessee.

⁷ Nevada, New Jersey (prior to abolition), Oregon, and Virginia.

⁸ Texas.

⁹ Arizona, younger than age 15; Connecticut, younger than age 16 (prior to abolition), and Wyoming (defendant reasonably should have known the victim was younger than age 17).

of murder victims aged 13-16 are killed in gun incidents. Among homicide victims aged 17-19, that rises to 85%. Younger children are more vulnerable to, and comparatively more likely to be killed by, beatings, asphyxiation, and strangulation: types of killings we are more likely to consider more reprehensible than the typical shooting death.¹⁰

The broadness of the age-18 provision also undermines the critical and constitutionally required narrowing function of death-eligibility factors. The U.S. Supreme Court has said that death penalty statutes must genuinely narrow the offenses for which the death penalty may be sought. But while the child-victim aggravating circumstances employed in most states would satisfy that constitutional mandate, House Bill 351 pushes the limit.

According to the Bureau of Justice Statistics, fully 10% of homicide victims in the United States in the years 1980 through 2008 were under age 18.¹¹ DPIC has reviewed more recent FBI Uniform Crime Statistics to determine how broadly House Bill 351 could affect eligibility for capital prosecution. As set forth in the tables below, under current homicide trends in the United States, an estimated 8%-9% of all murders (between 1 in 11 and 1 in 12) would become capital offenses under the bill.

¹⁰ See, e.g., FBI Uniform Crime Statistics, *Crime in the United States 2011*, Table 9: Murder Victims by Age by Weapon, <https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-9>.

¹¹ Alexia Cooper and Erica L. Smith, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* (Nov. 2011), <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

Table 1. FBI Uniform Crime Statistics (Single Victim/Single Perpetrator Cases)

Year	Total Victims	Victims Under Age 18		Victims Under Age 18 Killed by Offender Under Age 18		Total Death-Eligible	
		Number	%	Number	%	Number	%
2011	6,131	600	9.8	71	1.2	529	8.6
2012	6,018	523	8.7	75	1.2	448	7.4
2013	5,723	533	9.3	67	1.2	466	8.1
2014	5,703	547	9.6	80	1.4	467	8.2
2015	6,137	520	8.5	86	1.4	434	7.1
TOTAL	29,712	2,723	9.2	379	1.3	2,344	7.9

Table 2. FBI Uniform Crime Statistics (Murder Victims by Age, Expanded Homicide Data, 2010-2015)

Year	Total Victims	Victims Under Age 18	
		Number	%
2010	12,996	1,277	9.8
2011	12,664	1,187	9.4
2012	12,765	1,101	8.6
2013	12,253	1,027	8.4
2014	11,961	1,085	9.1
2015	13,455	1,093	8.1
TOTAL	76,094	6,770	8.9%

FBI Uniform Crime Statistics for the years 2011-2015 indicate that 9.2% of homicide victims killed in single victim/single perpetrator murders were under age 18 and so could be subject to the death penalty under HB 351. (See Table 1.) The FBI has sorted these cases by age of perpetrator as well, so one can estimate the percentage of cases that would not be death eligible because they were committed by juvenile offenders. The data indicate that 14% of homicides involving victims younger than age 18—or 1.3% of all single victim/single perpetrator homicides—were committed by offenders under age 18 against victims under age 18. But even

excluding these cases, an estimated 8% of all murders would become capital offenses under HB 351.

The FBI Uniform Crime Statistics for all homicides between 2010 and 2015 show that a total of 6,770 homicides during this period (8.9%) involved victims younger than age 18. (See Table 2.) The FBI does not supply age of perpetrator information for these data, but assuming a similar rate of offending by juvenile perpetrators, 7.6% of all homicides would be death eligible under House Bill 351. To understand the breadth of the provision, if adopted nationwide this approach would translate into 5,783 capital-eligible offenses over this six-year period, or roughly 964 new capital offenses per year.

BECAUSE OF THE HIGHLY EMOTIONAL NATURE OF CHILD-KILLING CASES, HOUSE BILL 351 CARRIES WITH IT A HEIGHTENED RISK OF WRONGFUL CONVICTION AND EXECUTION.

The very same factors that make child killings so horrifying also make them much more susceptible to wrongful conviction. The highly emotional and highly sensational nature of these cases increases the stakes and, for the prosecutor, the rewards of a conviction and creates both conscious and unconscious incentives for misconduct. The same is true for expert witnesses, and it should come as no surprise that a disproportionate number of junk-science exonerations and wrongful convictions involve the deaths of children.

One of the nation's most famous death-row exonerations and one of its most infamous wrongful executions involve the deaths of children.



Kirk Bloodsworth was convicted and sentenced to death in Maryland in 1984 for the brutal rape and murder of a young girl. The conviction rested on faulty eyewitness identifications by several child witnesses and the suppression of exculpatory evidence—including a police record identifying an alternate suspect who ultimately turned out to be the killer. Faced with this evidence, the jury rejected Mr. Bloodsworth’s alibi witnesses. Mr. Bloodsworth was granted a new trial, but again was convicted. This time, however, he was sentenced to life. He was released in 1993 only after subsequent DNA testing confirmed his innocence.¹²

Cameron Todd Willingham was convicted and sentenced to death in Texas in 1992 on charges that he murdered his three children by setting the house on fire. He was executed in 2004. His case is now widely regarded as a wrongful execution based upon junk expert testimony. Willingham was convicted of capital murder after arson investigators concluded—based upon 20 factors they considered to be indicators of arson—that an accelerant had been used to set three separate fires inside the Willingham home. Their conclusions were based upon principles of fire science that have since been repudiated. Four national arson experts who examined the trial evidence concluded that the original arson investigation in the case was flawed, that the fire may well have been accidental,



¹² See DPIC, *Innocence Cases*, <http://www.deathpenaltyinfo.org/node/4900#48>.

and that there was no scientific support for the prosecution's expert testimony that the fire had been deliberately set.

Noted arson expert, the late Gerald Hurst said, "There's nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire." Former Louisiana State University fire instructor Kendall Ryland added, "[It] made me sick to think this guy was executed based on this investigation.... They executed this guy and they've just got no idea—at least not scientifically—if he set the fire, or if the fire was even intentionally set."

As is typical of many of the child-victim exoneration cases, the prosecution bolstered its faulty evidence with false or perjured testimony. In the Willingham case, prosecutors presented false testimony from a jailhouse informant—a drug addict on psychiatric medication—who claimed Willingham had confessed to him in the county jail. Evidence discovered years after the Willingham execution showed that the prosecution had given Webb favorable treatment, then deliberately elicited perjured testimony from Webb that he had been promised and given nothing for his testimony.¹³

The use of junk arson science to condemn fathers for the deaths of their children is not limited to Texas. I am aware of two cases from my time representing death-row prisoners in Pennsylvania in which similarly flawed testimony led to the conviction of men whose children died in fires their fathers

¹³ See DPIC, *Executed But Possibly Innocent*, <http://www.deathpenaltyinfo.org/executed-possibly-innocent>. See also Steve Mills and Maurice Possley, *Texas Man Executed on Disproved Forensics*, Chicago Tribune (December 9, 2004); Anderson Cooper, *Was an Innocent Man Executed in Texas?*, Anderson Cooper 360 Blog (April 9, 2007); Maurice Possley, *The Prosecutor and the Snitch. Did Texas execute an innocent man?*, The Marshall Project (August 3, 2014).

almost certainly did not set.

Dennis Counterman was convicted and sentenced to death for the supposed arson murder of his two young sons. The prosecution whited-out from a police statement his intellectually disabled wife had given them her admission that she had awakened Mr. Counterman to let him know the house was on fire. The prosecution also withheld a social services record in its possession showing that one of Mr. Counterman's sons had a history of fire-starting. After winning a new trial as a result of prosecutorial misconduct and ineffective defense assistance, the prosecution threatened to capitally re prosecute Counterman. To obtain his immediate release, he pled no contest to lesser charges.

My former client Daniel Dougherty was arrested fourteen years after the fatal fire that killed his two sons and was charged with their murder based upon an accusation his ex-wife made during a bitter custody dispute claiming that Mr. Dougherty had confessed to setting the fire with gasoline. In fact, although the fire marshal conducted a professionally inadequate arson investigation, investigators *had* tested for accelerants and found none. To bolster the same type of inaccurate arson testimony that was presented in the Willingham case, prosecutors presented testimony from two prison "informants" that Dougherty had confessed to them. Like the informant in Willingham's case, both of these witnesses also had mental health problems and had received undisclosed benefits for their testimony.

Dougherty won a new trial as a result of his trial counsel's ineffectiveness in failing to seek the assistance of an expert witness in fire science, and Philadelphia prosecutors dropped the death penalty. However, on retrial, the court allowed the prosecution to read into the record the testimony of the now unavailable fire

marshal who had provided inaccurate arson testimony at Dougherty's first trial. In a "battle of the experts," in which the prosecutor called one of the nation's foremost arson experts nothing better than "a Kensington whore," Dougherty was convicted again.

At least three other people wrongly convicted of child-murder have been exonerated from death row.

Sabrina Butler was 17 years old when she was accused of murdering her 9-month old son. She was wrongly convicted and condemned by the state of



Photo by Michael S. Green

Mississippi in 1990. Butler's baby, who had a heart murmur, had stopped breathing. After attempts at resuscitation failed, Butler rushed to the hospital, where the young child was pronounced dead. Based on bruises left by her resuscitation attempts, she was arrested the next day for alleged child abuse, interrogated by the police, prosecuted, and sentenced to death.

Her conviction was overturned by the Mississippi Supreme Court in 1992, saying that the prosecution had failed to prove that the incident was anything more than an accident. Prosecutors nevertheless re-prosecuted her, but this time she was acquitted. It is now believed that the baby may have died either of cystic kidney disease or from sudden infant death syndrome (SIDS).¹⁴

Madison Hobley and **Kennedy Brewer** have also been exonerated after

¹⁴ See DPIC, *Innocence Cases*, <http://www.deathpenaltyinfo.org/node/4900#59>.

having been wrongly condemned for the deaths of children. You can read more details about their cases on DPIC's Innocence page on our website.

Like Ms. Butler, **Rodricus Crawford** was convicted and sentenced to death for the alleged murder of his infant son. As with Butler, Crawford sought help after his baby was non-responsive. Instead, he was condemned for murder. According to multiple medical experts, the local forensic pathologist botched the autopsy and, despite evidence of sepsis in the blood and pneumonia in both of the infant's lungs, concluded that the baby had been suffocated. Crawford was prosecuted by a controversial Assistant District Attorney in a case with significant racial overtones and condemned to die by a Caddo Parish, Louisiana jury. The Louisiana Supreme Court granted Crawford a new trial and the local court granted Crawford bail, but prosecutors are still determining whether to attempt to retry him.

House Bill 351 puts at risk other parents of physically frail or vulnerable children. It is estimated that hundreds of parents and other caregivers are imprisoned, some on death row, as a result of alleged shaken baby deaths. The junk diagnosis has been discredited in medical and legal journals, and yet prosecutions continue. Again, drawing from Pennsylvania experience, I have just a few examples.

Elizabeth and Samuel Glick were Amish dairy farmers. They took their 4-month-old daughter, Sara Lynn, to the hospital, where she died. Doctors saw hemorrhaging in her right eye and extensive bruising, and suspected child abuse; the autopsy showed blood and swelling in her brain. The county coroner ruled her

death a homicide.¹⁵ The Glicks could face capital prosecution under a statute like House Bill 351. But there was no homicide. The actual cause of Sara Lynn's death was a combination of vitamin K deficiency and rare genetic (bilesalt transporter) disorder.

Vulnerable or disfavored defendants are also at increased risk. In the case of *Commonwealth v. Alejandro Mendez* in Centre County, Pennsylvania, near Penn State University, a Costa Rican immigrant was capitally charged and held in custody for two years without a trial after the death of his infant son, Lucas, from subdural bleeding and retinal hemorrhaging. Again, there was no crime.

The Mendez family had come to the United States so his wife could be treated for cancer. However, at the same time she was breast feeding Lucas, she had been given antibiotics that impeded the baby's absorption of vitamin K. As a result, Lucas developed a bleeding disorder and could not clot. Prosecutors would not admit their error, and—facing death—Mendez was forced to plead no contest to manslaughter charges and be deported to Costa Rica.

CONCLUSION

At a time in which the death penalty is being used less frequently and is being subjected to closer public scrutiny—in part because of prosecutorial excesses and in part because of human fallibility—it is not clear how this proposed expansion of New Hampshire's death penalty would cost-effectively serve the public good.

¹⁵ See Tom Schactman, *Medical Sleuth*, Smithsonian Magazine (Feb. 2006), <http://www.smithsonianmag.com/science-nature/medical-sleuth-109556814/>.

The bill would, in one sweep of the pen, make 8%-9% of all murders capital offenses—in addition to those already authorized under the state’s capital punishment statute. The cost of such additional capital prosecutions could easily run into the millions of dollars. But is that cost justified? There is no evidence that the death penalty would deter these murders, and certainly no evidence that it would be more of a deterrent than life without possibility of parole. And in these very cases, there is an elevated risk of wrongful conviction and wrongful execution.

These are issues this body must address in deciding how to proceed regarding House Bill 351 and the state’s death penalty. The Death Penalty Information Center would be happy to provide the Committee with more extensive information on the points I have addressed during this testimony, and on any other questions it may have about capital punishment in New Hampshire.

Appendix A

States Authorizing the Death Penalty for Killing A Child

15 states that currently have the death penalty have age-of-victim aggravating circumstances authorizing capital prosecutions. Four other states that have abolished the death penalty had similar aggravating circumstances. They are:

Arizona: The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older

Arkansas: The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because the person was 12 years of age or younger

Connecticut (prior to abolition): Murder of a person under 16 years of age

Delaware (prior to abolition): The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim

Florida: The victim of the capital felony was a person less than 12 years of age

Illinois (prior to abolition): The murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty

Indiana: The victim of the murder was less than 12 years of age

Louisiana: The victim was under the age of 12 years

Nevada: The murder as committed upon a person less than 14 years of age

New Jersey (prior to abolition): The victim was less than 14 years old

Ohio: The offender in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense and the defendant committed the offense with prior calculation and design

Oregon: The victim of the intentional homicide was under the age of 14 years old

Pennsylvania: The victim was a child under 12 years of age

South Carolina: The murder of a child 11 years or younger

South Dakota: The offense was outrageously or wantonly vile, horrible, or inhuman

in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age

Tennessee: The murder was committed against a person less than 12 years of age and then defendant was 18 years of age or older

Texas: The person murders an individual under 10 years of age

Virginia: Murder victim was under the age of 14 and the defendant was 21 years of age or older

Wyoming: The defendant knew or reasonably should have known the victim was less than 17 years of age