IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICE MANUEL SIMS,

Petitioner,

vs.

THE HONORABLE JUDGE DOUGLAS W. HERNDON, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

Respondent.

Supreme Court Case No.
District Court Case No. C287414-1

APPENDIX TO PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION
VOLUME I
(PA 1- PA 158)

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

MAURICE MANUEL SIMS, #2684920
SASHA WILLIAMS, #2865547
BRANDON JEROME RANGE, aka
Brandon J. Range, #1969959
DARON MORRIS, #2797197

Defendant(s).

CASE NO: C-13-287414-1
DEPT NO: III

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka, Brandon J. Range, DARON MORRIS, accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO COMMIT BATTERY (Gross Misdemeanor – NRS 199.480, 200.481); BATTERY WITH A DEADLY WEAPON (Category B Felony – NRS 200.481); CONSPIRACY TO COMMIT BURGLARY (Gross Misdemeanor - NRS 199.480, 205.060); BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060); CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 199.480, 200.380); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165); CONSPIRACY TO COMMIT

MURDER (Category B Felony - NRS 199.480, 200.010); MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); and POSSESSION OF FIREARM BY EX-FELON (Category B Felony - NRS 202.360), committed at and within the County of Clark, State of Nevada, on or between January 4, 2013 and January 8, 2013 as follows:

COUNT 1 - CONSPIRACY TO COMMIT BATTERY

Defendants MAURICE MANUEL SIMS and DARON MORRIS, did, on or about the 4th day of January, 2013, then and there meet with each other and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit a crime, to-wit: battery and/or battery with a deadly weapon, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 – BATTERY WITH A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS and DARON MORRIS, did, on or about the 4th day of January, 2013, then and there wilfully and unlawfully use force or violence upon the person of another, to-wit: KENNETH SCOTT by stiking the said KENNETH SCOTT with a deadly weapon, to-wit: a firearm, the defendants being responsible under the following theories of criminal liability, to-wit: 1) by directly committing the acts constituting the offense; and/or 2) by aiding and abetting each other by Defendant MAURICE MANUEL SIMS calling Defendant DARON MORRIS to the scene, thereafter by Defendant DARON MORRIS handing a firearm to Defendant MAURICE MANUEL SIMS, thereafter Defendant MAURICE MANUEL SIMS striking the said KENNETH SCOTT with the firearm, the defendants counseling and encouraging and acting in concert throughout; and/or 3) by a conspiracy to commit battery and/or battery with a deadly weapon.

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COUNT 3 - CONSPIRACY TO COMMIT BURGLARY

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there meet with each other and between themselves, and each of them with the other, wilfully and unlawfully conspire and agree to commit a crime, to-wit: burglary, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 4, said acts being incorporated by this reference as though fully set forth herein.

COUNT 4 - BURGLARY WHILE IN POSSESSION OF A FIREARM

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8thday of January, 2013, then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, with intent to commit theft and/or a felony, to-wit: robbery, that certain building occupied by LAURICE BRIGHTMAN and/or ANTHONY ANDERSON and/or EVIN RUSSELL, located at 370 East Harmon Avenue, Apartment No. P-102 thereof, Las Vegas, Clark County, Nevada, the Defendants did possess and/or gain possession of a deadly weapon consisting of a firearm during the commission of the crime and/or before leaving the structure, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby the Defendants entered the residence, three of them possessing a firearm; and/or (3) pursuant to a conspiracy to commit this crime.

COUNT 5 - CONSPIRACY TO COMMIT ROBBERY

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there meet with each other and between themselves, and each

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of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: robbery, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 6 through 8, said acts being incorporated by this reference as though fully set forth herein.

COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of LAURICE BRIGHTMAN, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said LAURICE BRIGHTMAN, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said LAURICE BRIGHTMAN and/or took said property, three of the co-conspirators possessing a firearm; and/or (3) pursuant to a conspiracy to commit this crime.

COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of ANTHONY ANDERSON, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said ANTHONY ANDERSON, said Defendants using a deadly

weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said ANTHONY ANDERSON and/or took said property, three of the co-conspirators possessing a firearm; and/or (3) pursuant to a conspiracy to commit this crime.

COUNT 8 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of EVIN RUSSELL, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said EVIN RUSSELL, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said EVIN RUSSELL and/or took said property, three of the co-conspirators possessing a firearm; and/or (3) pursuant to a conspiracy to commit this crime.

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COUNT 9 - CONSPIRACY TO COMMIT MURDER

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there meet with each other and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Counts 10 through 12, said acts being incorporated by this reference as though fully set forth herein.

COUNT 10 - MURDER WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill ANTHONY ANDERSON, a human being, by shooting at and into the body of the said ANTHONY ANDERSON, with a deadly weapon, to-wit: firearm, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one of the co-conspirators shot at and into the body of the said ANTHONY ANDERSON while the other co-conspirators stood nearby and/or acted as lookouts; and/or (3) pursuant to a conspiracy to commit this crime.

COUNT 11 - MURDER WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill EVIN RUSSELL, a human being, by shooting at and into the body of the said EVIN RUSSELL, with a deadly weapon, to-wit: firearm, the Defendants being criminally liable under one or more of the

following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one of the co-conspirators shot at and into the body of the said EVIN RUSSELL while the other co-conspirators stood nearby and/or acted as lookouts; and/or (3) pursuant to a conspiracy to commit this crime.

COUNT 12 - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON

Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there, without authority of law, and malice aforethought, willfully and feloniously attempt to kill LAURICE BRIGHTMAN, a human being, by shooting at and into the body of the said LAURICE BRIGHTMAN, with a deadly weapon, to-wit: a firearm, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one of the co-conspirators shot at and into the body of the said LAURICE BRIGHTMAN while the other co-conspirators stood nearby and/or acted as lookouts; and/or (3) pursuant to a conspiracy to commit murder.

COUNT 13 - POSSESSION OF FIREARM BY EX-FELON

Defendant MAURICE MANUEL SIMS, did, on or between the 4th day and the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously own or have in his possession, or under his control, a weapon, to-wit: firearm, the said Defendant being an ex-felon, having in 2009, been convicted of Attempt Grand Larceny From the Person, in Case No. C250644A, in the Eighth Judicial District Court, Clark County a felony under the laws of the State of Nevada.

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COUNT 14 - POSSESSION OF FIREARM BY EX-FELON

Defendant BRANDON JEROME RANGE, aka, Brandon J. Range, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously own or have in his possession, or under his control, a weapon, to-wit: firearm, the said Defendant being an ex-felon, having in 2006, been convicted of Conspiracy to Commit Robbery and Robbery, in Case No. C214982 and/or having in 2009, been convicted of Attempt Burglary, in Case No. C251043, all felonies in the Eighth Judicial District Court, Clark County a felony under the laws of the State of Nevada.

DATED this 12th day of February, 2013.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

ENDORSEMENT: A True Bill

_____
Foreperson, Clark County Grand Jury

Names of witnesses testifying before the Grand Jury:

BRIGHTMAN, LAURICE, c/o CCDA, 200 Lewis Ave, LV, NV

GAVIN, LISA, CC CORONER'S OFFICE

JENSEN, BARRY, LVMPD# 3662

MATZKE, BRAD, c/o CCDA, 200 Lewis Ave, LV, NV

SCOTT, KENNETH, JR., 2101 W WARM SPRINGS RD #3718, HENDERSON NV 89104

WILDEMANN, MARTIN, LVMPD# 3516

Additional witnesses known to the District Attorney at time of filing the Indictment:

BUNN, CHRISTOPHER, LVMPD# 4407

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

TOLBERT, VENNIE, 629 W 129TH PLACE, CHICAGO, IL, 60628

WILLIAMS, TOD, LVMPD# 3811

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LVMPD EV# 1301084025
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- MAURICE MANUEL SIMS, #2684920, DARON MORRIS, #2797197, Defendants.	CASE NO: C287414-1 C287414-4 DEPT NO: III

NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, pursuant to NRS 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty hearing for a conviction of Murder in the First Degree on either COUNTS 10 or 11 of the Indictment filed in the instant case. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

AGGRAVATING CIRCUMSTANCES WHICH APPLY TO BOTH DEFENDANT SIMS AND MORRIS AND BOTH MURDERS IN COUNTS 10 AND 11

1. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a

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person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

Defendants have been charged with Murder With Use of a Deadly Weapon for two (2) murders in COUNTS 10 (ANTHONY ANDERSON) and 11 (EVIN RUSSELL) of the instant Indictment. It is anticipated that Defendants will be convicted on both counts resulting in this aggravating circumstance. [NRS 200.033(12)]. Therefore, each defendant will have been convicted of more than one offense of murder in the first or second degree at the time of the penalty hearing.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there, without authority of law, and malice aforethought, willfully and feloniously attempt to kill LAURICE BRIGHTMAN, a human being, by shooting at and into the body of the said LAURICE BRIGHTMAN, with a deadly weapon, to-wit: a firearm, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one of the co-conspirators shot at and into the body of the said LAURICE BRIGHTMAN while the other co-conspirators stood nearby and/or acted as lookouts; and/or 3) pursuant to a conspiracy to commit murder. [See NRS 200.033(2)(b)]

Defendants are charged with ATTMEPT MURDER WITH USE OF A DEADLY WEAPON in the instant Indictment in COUNT 12. The State anticipates that both defendants may be convicted of such charge prior to any penalty hearing in the instant case.

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Attempt Murder with Use of a Deadly weapon is a felony involving the use or threat of violence by its elements and/or the facts of the instant case. Therefore, at the time of the penalty hearing in the instant case, the defendants will have been convicted of a felony involving the use or threat of violence.

3. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL SIMS and DARON MORRIS, did, on or about the 4th day of January, 2013, then and there wilfully and unlawfully use force or violence upon the person of another, to-wit: KENNETH SCOTT by stiking the said KENNETH SCOTT with a deadly weapon, to-wit: a firearm, the defendants being responsible under the following theories of criminal liability, to-wit: 1) by directly committing the acts constituting the offense; and/or 2) by aiding and abetting each other by Defendant MAURICE MANUEL SIMS calling Defendant DARON MORRIS to the scene, thereafter by Defendant DARON MORRIS handing a firearm to Defendant MAURICE MANUEL SIMS, thereafter Defendant MAURICE MANUEL SIMS striking the said KENNETH SCOTT with the firearm, the defendants counseling and encouraging and acting in concert throughout; and/or 3) by a conspiracy to commit battery and/or battery with a deadly weapon. [See NRS 200.033(2)(b)]

Defendants are charged with BATTERY WITH A DEADLY WEAPON in the instant Indictment in COUNT 2. Battery with Use of a Deadly Weapon is a felony involving the use or threat of violence by its elements and the facts of the instant case. The State anticipates that both defendants may be convicted of such charge prior to any penalty hearing in the instant case.

4. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL

SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of LAURICE BRIGHTMAN, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said LAURICE BRIGHTMAN, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said LAURICE BRIGHTMAN and/or took said property, three of the co-conspirators possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(2)(b)]

Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in the instant Indictment in COUNT 6. Robbery with Use of a Deadly Weapon is a violent felony by its elements and the instant facts. The State anticipates that both defendants may be convicted of such charge prior to any penalty hearing in the instant case.

5. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value. [See NRS 200.033(6)]. The evidence will show that Defendant's originally targeted these victims and this apartment as they believed that the victim's owed Sasha $200.00 and/or a television set. The Defendants originally attempted to acquire the $200.00 or television set, however, when those efforts failed, they proceeded to rob and kill the victims.

6. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, to- wit: BURGLARY WHILE IN POSSESSION OF A

FIREARM as alleged in COUNT 4 of the instant Indictment. That count alleges that Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, with intent to commit theft and/or a felony, to-wit: robbery, that certain building occupied by LAURICE BRIGHTMAN and/or ANTHONY ANDERSON and/or EVIN RUSSELL, located at 370 East Harmon Avenue, Apartment No. P-102 thereof, Las Vegas, Clark County, Nevada, the Defendants did possess and/or gain possession of a deadly weapon consisting of a firearm during the commission of the crime and/or before leaving the structure, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby the Defendants entered the residence, three of them possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

AGGRAVATING CIRCUMSTANCES WHICH APPLY TO BOTH DEFENDANT SIMS AND MORRIS AND THE MURDERS IN COUNT 10 (ANTHONY ANDERSON)

7. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of EVIN RUSSELL, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said EVIN RUSSELL, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being

criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said EVIN RUSSELL and/or took said property, three (3) of the co-conspirators possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(2)(b)]

Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in the instant Indictment in COUNT 8. Robbery with Use of a Deadly Weapon is a crime involving the use or threat of violence by its elements and the facts of this case. The State anticipates that both defendants may be convicted of such charge prior to any penalty hearing in the instant case.

8. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, to- wit: ROBBERY WITH USE OF A DEADLY WEAPON as alleged in COUNT 7 of the instant Indictment. That count alleges that Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of ANTHONY ANDERSON, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said ANTHONY ANDERSON, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of

conduct whereby one or more of the co-conspirators demanded money from the said ANTHONY ANDERSON and/or took said property, three of the co-conspirators possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

AGGRAVATING CIRCUMSTANCES WHICH APPLY TO BOTH DEFENDANT SIMS AND MORRIS AND THE MURDERS IN COUNT 11 (EVIN RUSSELL)

9. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously enter, while in possession of a firearm, with intent to commit theft and/or a felony, to-wit: robbery, that certain building occupied by LAURICE BRIGHTMAN and/or ANTHONY ANDERSON and/or EVIN RUSSELL, located at 370 East Harmon Avenue, Apartment No. P-102 thereof, Las Vegas, Clark County, Nevada, the Defendants did possess and/or gain possession of a deadly weapon consisting of a firearm during the commission of the crime and/or before leaving the structure, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby the Defendants entered the residence, three of them possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(2)(b)]

Defendants are charged with ROBBERY WITH USE OF A DEADLY WEAPON in the instant Indictment in COUNT 8. Robbery with Use of a Deadly Weapon is a violent felony by its elements and the facts of this case. The State anticipates that both defendants may be convicted of such charge prior to any penalty hearing in the instant case.

//

10. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, to- wit: ROBBERY WITH USE OF A DEADLY WEAPON as alleged in COUNT 7 of the instant Indictment. That count alleges that Defendants MAURICE MANUEL SIMS, SASHA WILLIAMS, BRANDON JEROME RANGE, aka Brandon J. Range and DARON MORRIS, did, on or about the 8th day of January, 2013, then and there wilfully, unlawfully, and feloniously take personal property, to-wit: a television, a Sony PlayStation, a MacBook Pro, cellular telephones, jewelry and/or U.S. currency, from the person of EVIN RUSSELL, or in his presence, by means of force or violence or fear of injury to, and without the consent and against the will of the said EVIN RUSSELL, said Defendants using a deadly weapon, to-wit: a firearm, during the commission of said crime, the Defendants being criminally liable under one or more of the following principles of criminal liability, to-wit: 1) by directly committing this crime; and/or 2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by providing counsel and/or encouragement and by entering into a course of conduct whereby one or more of the co-conspirators demanded money from the said EVIN RUSSELL and/or took said property, three of the co-conspirators possessing a firearm; and/or 3) pursuant to a conspiracy to commit this crime. [See NRS 200.033(4)].

DATED this 8th day of March, 2013.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Marc DiGiacomo
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of Notice Of Intent To Seek Death Penalty, was made this 8th day of March, 2013, by facsimile transmission to:

CARL ARNOLD, Esq.
363-2534

IVETTE MANINGO, Esq.
386-2737

BY: /s/ R. Johnson
R. JOHNSON
Secretary for the District Attorney's Office

MD/rj/M-1

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CLERK OF THE COURT

MOT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

MAURICE MANUEL SIMS,
#2684920

Defendant.

CASE NO. C287414

DEPT. III

MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444

COMES NOW, Defendant, MAURICE MANUEL SIMS, by and through his attorneys of record, IVETTE A. MANINGO, ESQ. and ANTHONY P. SGRO, ESQ., of PATTI, SGRO & LEWIS, and files his Motion to Strike the State's Notice of Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant Policy Considerations. In the alternative,

Defendant, MAURICE MANUEL SIMS, respectfully requests that this Court stay the capital proceedings against him until the resolution of the financial audit provided for in the recently adopted Assembly Bill 444.

This Motion is based on the following points and authorities and any oral argument at the time set for hearing on the Motion.

DATED this 19 day of July, 2013.

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
Nevada Bar No. 3811
720 S. 7th Street, Suite 300
Las Vegas, NV 89101
Attorneys for Defendant

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff; and

TO: STEVEN WOLFSON, District Attorney,

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing before the above-entitled Court on the 1st day of August, 2013 at the hour of 9:00Am, or as soon thereafter as counsel may be heard.

DATED this 19 day of July, 2013.

Respectfully Submitted By:

PATTI, SGRO & LEWIS

ANTHONY P. SGRO, ESQ.
Nevada Bar No.: 3811
720 S. 7th Street, Suite 300
Las Vegas, NV 89101
Attorney for Defendant Sims

POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

1. The fiscal impact of the death penalty is a growing concern in Nevada, as evidenced by the legislature passing Assembly Bill 444 calling for an audit of the cost of capital punishment.

2. That upon completion of the death penalty audit, the legislature will decide the appropriateness of capital punishment in light of its true fiscal impact on Nevada.

3. That in other jurisdictions, similar analyses of the costs of the death penalty resulted in the abolishment of capital punishment.

4. If the legislature does abolish the death penalty, the Court and this Defendant will needlessly go through a protracted litigation process.

II. INTRODUCTION

It is a well-founded principle that "death is a different kind of punishment from any other which may be imposed in this country." Gardner v. Florida, 430 U.S. 349, 357 (1977). While the moral and sociological debates over the death penalty have not resulted in a comprehensive ban of capital punishment, the American discourse on the subject has dramatically shaped the means and methods by which the death penalty is carried out. Due to concerns regarding not only the finality of capital punishment, but the real possibility of innocent people being sentenced to die, the United States Supreme Court has reinforced the need for more rigorous procedural requirements relative to imposition of the death penalty. See, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). The Supreme Court has gone so far as to suggest that the process due to an

offender faced with prison does not necessarily satisfy the process due to capital offenders. Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J. concurring). See also, Williams v. Georgia, 349 U.S. 375, 391 (1955) (distinguishing capital and non-capital offenses).

The debate over the process due to capital offenders came to a head in 1972 with the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). In Furman, the High Court granted certiorari to determine whether imposition of the death penalty under Georgia's capital sentencing scheme constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Id. at 239. In a per curium opinion consisting of one paragraph, the Court held that it did. Id. at 240. The plurality decision rendered in Furman has since been construed as requiring that, at a minimum, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality op.).

Following the decision in Furman, states that still impose the death penalty have been required to enact procedural safeguards for capital proceedings in order to comport with the Supreme Court's rigorous standards.

In Nevada, the special rules governing a capital proceeding can be found in Nevada Supreme Court Rule 250, as well as NRS 175.552 and 175.554. Rule 250 requires the appointment of two attorneys to try each capital case, as well as mandatory appointment of counsel for direct appeal and post conviction habeas corpus proceedings. NRS 175.552 mandates a penalty phase in which mitigating and aggravating factors are presented to the jury. Further, case law has required additional safeguards for the imposition of the death penalty, such as the requirement of trial counsel to prepare for mitigation. See Jones v. State, 124 Nev. 1483, 238 P.3d

827 (2008).

Each of these factors has contributed to the overall cost of the pursuit of, and the defense against, the imposition of the death penalty. As such, many jurisdictions, including Nevada, have questioned the benefit that they are receiving from the costs expended. Of the eighteen (18) States that do not have capital punishment, six (6) of those States have abolished the death penalty within the last decade, the most recent being Maryland.

The Nevada legislature appears to be falling in line with this trend. On May 2, 2013, Assembly Bill 444 was introduced before the Assembly. Assembly Bill 444 is nearly identical to Assembly Bill 501, which was passed in the 76th Session, ultimately AB 501 was vetoed by the Governor due to its lack of specificity. The newly reworked AB 444 specifically addressed the concerns of the Governor and added provisions for the methodologies and auditing standards to be used in the death penalty audit.

At the introduction of the Bill, Senator Tick Segerblom, Senatorial District No. 3 testified before the Assembly that the death penalty does not "work." See *Minutes Assembly Committee on Legislative Operations and Elections, May 2, 2013* attached hereto as "Exhibit 1," p. 9. He stated that:

> We prosecute too many people, and a study of the current system, to determine why there are so many death penalty charges, is needed. Did you know the cost to prosecute a death penalty case is double that of a case involving life without the possibility of parole? If there is a way to reduce the number of people that are charged and reduce that cost, it would be a great savings for our state. That is why I think we have to do this audit. It will be done by staff so there is no additional cost to the state. *Id.*

Nancy E. Hart, from the Nevada Coalition Against the Death Penalty, who introduced the Bill, testified that while there have been few executions in Nevada, there are eighty (80) people currently on death row that are creating a "backlog." *Id.* at p.10. If the death penalty remains in Nevada, there will eventually come a time when all of the people comprising this "backlog" will

have to be executed, resulting in accrued costs. *Id.*

Michael Pescetta, of the Federal Public Defender's Office, testified that in the thirty-six (36) years since the death penalty was reinstated in Nevada, 151 death sentences were imposed in Nevada. Of those 151 death row inmates, only twelve (12) have been executed. Of those twelve, eleven (11) were voluntary executions. *Id.* at 12. As such, only one (1) person has been involuntarily executed in the State of Nevada since the death penalty was reinstated, out of 151 costly convictions, and attendant appeals.

On May 17, 2013, following the above-referenced testimony on this matter, the Assembly passed Bill 444 with vote of thirty-eight (38) to one (1). The Senate passed the Bill on May 30, 2013 by a vote of eleven (11) to ten (10). Finally, on June 10, 2013, the Bill was approved by Governor Sandoval and codified as Chapter 469 of the Laws of the State of Nevada, 2013.

III. JURISDICTIONAL TRENDS

Since 2007, six (6) states, namely Maryland, Connecticut, Illinois, New Mexico, New York, and New Jersey, have joined an already increasing number of states which have repealed or abolished capital punishment. Almost all six states referenced above have cited the increasing cost of litigating capital cases as motivation for the abolishment of the death penalty.

Studies performed in Nevada have echoed the concerns of these jurisdictions, noting the increasing cost of both prosecuting and defending capital cases, as well as the costs presented by a lengthy appellate process. These factors indicate that the cost of the death penalty in Nevada has become too great a burden on the State, for little reward. As such, Nevada should follow the trend of American states that have abolished the antiquated, unworkable, and costly relic of old world punishment embodied by the death penalty.

1. New York

After reinstating the death penalty in 1995, New York's high court, the Court of Appeals,

entertained a constitutional challenge to the death penalty scheme in People v. LaValle, 3 N.Y. 3d 88 (2004). In La Valle, the Court of Appeals found that New York's death penalty scheme was unconstitutional based upon a provision that mandated the judge to impose a sentence of life with the possibility of parole when the jury was deadlocked on the issue of whether to impose death or life without the possibility of parole. *Id.* In essence, a defendant in a capital case would be given a lesser sentence than either of the sentences being adjudicated by the deadlocked jury. *Id.* The Court of Appeals found that such a system was coercive and tainted jurors who feared that if they did not vote for capital punishment the defendant would receive the possibility of parole. *Id.* As such, the Court effectively abolished the death penalty in New York, pending any legislative change to the death penalty scheme.

After the high court's ruling, death sentences which had previously been imposed were overturned. See People v. Taylor, 9 N.Y.3d 129, 137, 878 N.E.2d 969, 971 (2007). In 2005, the New York Assembly considered the issue of reinstating the death penalty and held five public hearings on capital punishment between December 15, 2004 and February 11, 2005 and a report was made based upon these hearings. See *The Death Penalty in New York, April 3, 2005* attached as Exhibit "2." Among the factors considered by the Assembly were the costs of reinstating capital punishment. *Id.*

At those hearings James Liebman, a Columbia University Law Professor, predicted that reinstatement of the death penalty, over a period of twenty years, would cost the State approximately $500 million dollars. *Id.* at p. 29. Jonathan Gradess of the New York State Defenders Association testified that conservative estimates were that $170 million dollars were spent since 1995 on capital prosecutions and defense. *Id.* at p. 30. Gradess further stated that with seven death sentences imposed, taxpayers paid approximately $24 million dollars per execution. *Id.* at p.30.

No action to reinstate the death penalty was ever taken by the New York legislature.

2. New Jersey

On January 10, 2006, the Senate introduced Bills S171 and S2471, calling for the elimination of the death penalty. See *Legislative History of S171*, attached as Exhibit "3." On January 12, 2006, the legislature approved an Act, codified as P.L.2005, c.321 imposing a moratorium on the death penalty and creating a study commission to evaluate the fiscal and social impact of the death penalty. See *P.L.2005, c.321*, attached hereto as Exhibit "4."

In 2007, the newly created Death Penalty Study Commission generated its report on the social and fiscal impact of the death penalty in the New Jersey. See *New Jersey Death Penalty Commission Report* attached hereto as Exhibit "5." In this report, the Committee acknowledged that it was unable to precisely pinpoint the costs of the death penalty. It was, however, able to gather data from government entities with a projection of the estimated savings. *Id.* at p. 31. The office of the Public Defender noted that elimination of capital cases would result in an annual savings of $1.46 million per year. *Id.* The Department of Corrections noted that it would save $974,430 to $1,229,240 per death row inmate over each inmate's lifetime. *Id.* at p. 32. While the Administrative Office of the Courts (AOC) stated that elimination of the death penalty cannot be absolutely fiscally quantified, the AOC did state that the repeal of capital punishment would generate savings in trial court costs and proportionality review costs. *Id.*

In November 21, 2007, the New Jersey Senate published its legislative fiscal estimate for Senate Bill 171, citing, in part, the report of the Death Penalty Commission. See *Legislative Fiscal Estimate for Senate Bills 171 and 2471* attached hereto as Exhibit "6." In that report, the Senate Subcommittee found that the State of New Jersey would save the following per death penalty trial: $79, 926 in Public Defender costs, $148,185 in judicial trial costs, and $93,018 in proportionality review costs. *Id.* at pp. 4-6. On December 13, 2007, the Assembly passed the

Senate Bill 171 and it was signed by the governor on December 17, 2007, eliminating the Death Penalty in New Jersey. See Exhibit "7"; *News Release Jon S. Corzine* attached as Exhibit "8."

3. New Mexico

In 2009, the New Mexico legislature passed House Bill 285, which removed the penalty of death from the sentencing authority for capital felonies and effectively abolished the death penalty in the state of New Mexico. See *House Bill 285,* attached hereto as Exhibit "9." In a statement after passage of the law, Governor Richardson cited the 130 inmates freed from New Mexico's death row since 1973 and added, "The sad truth is the wrong person can still be convicted in this day and age, and in cases where that conviction carries with it the ultimate sanction, we must have ultimate confidence, I would say certitude, that the system is without flaw or prejudice. Unfortunately, this is demonstrably not the case." See *Statement of Governor Bill Richardson, March 18,* 2009, attached hereto as Exhibit "10." The repeal brought with it great support. "As beautiful as our justice system is ... it is still a justice system of human beings, and human beings make mistakes," Sen. Cisco McSorley, an Albuquerque Democrat, said during nearly three hours of debate. See *New Mexico legislature votes to repeal the death penalty, The Guardian, March 13, 2009*, attached hereto as Exhibit "11."

Before a vote was taken on the Bill, the Legislative Finance Committee prepared its Fiscal Impact Report. See *Fiscal Impact Report titled "Abolish Death Penalty," dated January 31, 2009* attached hereto as Exhibit "12." Although the author of the report acknowledges that New Mexico has never performed a study of costs of the death penalty to the State, the report outlines the additional costs required in the litigation of capital cases:

> The State Bar Task Force on the Administration of the Death Penalty, completed in 2004, outlines exactly why death penalty cases are so costly: These cases require heightened standards for defense counsel and at least two highly qualified defense attorneys at each stage of the proceedings. They require extensive trial level litigation as well as constitutionally and statutorily mandated appeal. Unlike any other criminal trial, these cases demand that a certified court reporter

> transcribe all proceedings. The survivors of the victim should be accorded particular respect. Jury selection is a long and arduous process that potentially touches on the constitutional and religious rights of New Mexicans and costs at least four times as much as a non-death first-degree murder case. Due to changes in federal habeas corpus law, these cases must be long and thoroughly litigated in state court habeas proceedings as well. The Task Force ultimately recognized and recommended substantial changes to the way death penalty cases are prosecuted and defended in New Mexico, which may increase further costs. *Id.* at p. 2; (citations omitted).

Many, if not all, of the factors that the Fiscal Impact Report cites, echo the requirements of capital prosecutions in the State of Nevada. See *Nev. Sup. Ct. R. 250.* Like New Mexico, Nevada requires at least two (2) specially qualified and experienced defense counsel on capital cases. *Id.* Further, Nevada and New Mexico both mandate the appeal of any capital conviction, mandatory transcription of all proceedings, as well as a bifurcated penalty phase. *Id.* Moreover, like New Mexico, capital prosecutions in Nevada can cost in excess of twice the amount for defense counsel at trial alone. See *Estimates of Time Spent in Capital and non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys, February 21, 2012* attached hereto as Exhibit "13."

4. Illinois

Since 1977, Illinois has exonerated 13 death row inmates, which is one more than the State has successfully executed. Innocent defendant Anthony Porter came within 48 hours of being executed. *Fixing the Death Penalty, Chicago Tribune, December 29, 2000*, attached as Exhibit "14." See also Leigh B. Bienen, The Quality of Justice in Capital Cases: Illinois as a Case Study, 61 Law and Contemp. Probs. 193 at 213 (1993). In light of Porter's case, Illinois Governor Ryan was noted as saying: "I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row." He remarked that he could not support a system that has come "so close to the ultimate nightmare, the state's taking of innocent life." *Illinois Governor Ryan's Press Release (January 31, 2000)* attached hereto as Exhibit "15."

Not least among the concerns about the Illinois death penalty, was the cost of these botched capital convictions. Leigh B. Bienen, a senior lecturer at Northwestern University School of Law noted that the State of Illinois wasted millions of dollars prosecuting a capital murder case against an alleged murder named Brian Dugan. Bienen stated

> ...the state of Illinois wasted millions imposing a death sentence on Brian Dugan, who was already serving life in prison without possibility of parole for another murder. This is not a wise or sober use of public monies. It is no solace to the public, to the thousands of other murder victims' families, or to the professionals committed to a principled criminal justice system. To make matters worse, this prosecution came only after two other people were wrongfully convicted, retried, and convicted again for the crime Dugan admitted to having committed. The state spent millions of dollars prosecuting these capital cases, and then paid out millions more to the men it had wrongfully sentenced to death. Leigh B. Bienen, Capital Punishment in Illinois in the Aftermath of the Ryan Commutations: Reforms, Economic Realities, and A New Saliency for Issues of Cost, 100 J. Crim. L. & Criminology 1301, 1389-90 (2010).

Bienen's reflection on the Dugan case reflects the prevailing notion that the costs of the death penalty simply do not produce sufficient benefit to make the system workable. Not only is there a real and present possibility of a wrongful conviction that could result in the execution of an innocent, but even rectifying a wrongful conviction can cost millions of dollars to the State.

In response to knowledge of potential wrongful convictions such as Porter's, Governor Ryan declared a moratorium on the death penalty which continued until Illinois Governor Pat Quinn signed a bill abolishing the practice. Senate Bill 3539 abolished the death penalty in Illinois, and barred executions after the effective date of the Act. *See SB 3539,* attached hereto as Exhibit "16." In addition, the effect of the passage of SB 3539 was such that the sentence of the death penalty was to be taken into consideration when determining eligibility for life imprisonment, and anyone who received a sentence of death was to have such sentence commuted to life imprisonment. *Id.*

On March 9, 2011, Illinois Governor Pat Quinn signed into law Senate Bill 3539, which effectively abolished the death penalty in Illinois.

5. Connecticut.

In 2012, Connecticut Gov. Dannel Malloy signed Senate Bill 280 into law which abolished the death penalty, replacing the practice with life in prison without the possibility of parole as the state's highest form of punishment. *See Senate Bill 280*, attached hereto as Exhibit 17. The governor noted that the "unworkability" of Connecticut's prior death penalty law was a contributing factor in his decision to repeal, although he went on to say that the practice "..Adds up (as) a costly and rarely used punishment." *Id.* Proposed amendments from supporters of the death penalty were defeated during debates to pass the bill, mainly because lawmakers were swayed by other national cases in which states had exonerated people sentenced to death and by arguments that the practice was carried out in an arbitrary manner and served only to drain states of financial resources. *See "Death Penalty Repeal Goes to Connecticut Governor," The New York Times,April 11, 2012* attached hereto as Exhibit "18."

6. Maryland

In the past decade Maryland joined a growing trend of states leaning toward the abolishment of the death penalty because of the potential likelihood of sentencing the innocent. For years, Maryland protesters called on lawmakers to repeal the death penalty. After a 2002 study that found an increasing amount of racial disparities and wrongful convictions in the state, calls for the practice's repeal grew louder. Over the last several years, bills to abolish the practice never made it out of a legislative committee, however, until recent efforts grew, and groups such as the NAACP helped to ensure necessary votes were there. See *In Death Penalty Repeal, reason over revenge at long last*, Baltimore Sun, March 16, 2013 attached hereto as Exhibit "19."

In May 2013, Maryland became the eighteenth and most recent U.S. state to abolish the death penalty when Governor Martin O'Malley signed Senate Bill 276 outlawing the practice. *See Senate Bill 276,* attached hereto as Exhibit "20." "This is a big day where we get to reset and get back to having our justice system be about just that- justice," said Benjamin Jealous of the NAACP. Among dozens present for SB 276's signing, was Kirk Bloodsworth, who spent years campaigning for its repeal. *In Death Penalty Repeal*, Exhibit "19." He was released from Maryland's death row in 1993, after DNA evidence proved he was wrongfully convicted. "Man, I killed the thing that almost killed me. Nobody will ever have to suffer from this thing again. Nobody will die in this state, especially an innocent person," said Bloodsworth. *Id.*

While a myriad of reasons were cited by Maryland, including reliability of verdict, actual innocence, and racial disparity, Maryland also cited the cost of the death penalty as a factor in repealing capital punishment.

In March 2008, the Urban Institute Justice Policy Center published a report on the cost of the death penalty in Maryland. See *Report* attached as Exhibit "21." The report found that in the 162 cases where a "death notice" was filed by the State, taxpayers paid an additional 186 million dollars, or over one million dollars per notice. *Id.* at 28. Such concerns about the fiscal cost of the death penalty in conjunction with moral and social factors were reflected in the final Act. The Act repealing the death penalty in Maryland specifically cited that the savings from the repeal of the death penalty would result in a savings to the general fund. The Act further noted that this increase to the general fund would benefit to the Victims of Crime Fund, which was funded by the same source. See Exhibit "20," p. 3. As such, the repeal of the death penalty in Maryland not only saved lives, but it also redirected funds to help the victims of crime rebuild their lives.

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III. The Death Penalty in Nevada

A recent study in Nevada has shown that there is great interest in the cost of capital cases versus non-capital cases, and that Nevada may be leaning towards the preclusion of the practice based on its economic effects. Dr. Terrance Miethe of the Department of Criminal Justice at the University of Nevada, Las Vegas, analyzed the time and costs incurred by defense attorneys working on capital and non-capital cases. See *Estimates of Time Spent in Capital and non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys, February 21, 2012* attached hereto as Exhibit "13." The study concluded that defense attorneys in Clark County spend an average of 2,298 hours on capital cases, whereas they spend an average of 1,087 hours on non-capital cases. *Id.* at p. 4. This disparate workload is reflected in the costs incurred by the State in funding capital defense attorneys. The difference in attorney's fees between a non-capital murder case and a capital case is $169,700 for the public defender's office, and $212,125 for private assigned counsel. *Id.* at 8. This figure only encompasses attorney's fees and does not include the additional costs of a mitigation expert, additional investigator fees, or hard costs associated with the increased scrutiny of a death penalty case.

Not only do capital cases in Nevada result in significant increases in costs for the state, but the time spent defending capital cases is increased tremendously when compared to cases in which the disposition is life without the possibility of parole. *Id.* Of the cases in Clark County between 2009 and 2011 that resulted in a death sentence penalty, the time spent trying these cases was approximately 1,107 days from the time of the initial filing through sentencing, whereas cases which resulted in life sentences took an average of 887 days. *Id.* However, there is little gain justified by these results. Of the thirty-five (35) capital cases in Clark County brought between 2009 and 2011, only five (5) resulted in the death penalty. *Id.* at p. 11. This results in a 14.3% death penalty imposition rate, with nearly 85% of the defendants being given a life sentence or

less. *Id.* However, the 85% of death penalty cases that did not result in death still cost the tax payers more than double the amount of a non-capital trial.

Further, Nevada currently does not have the capacity to humanely execute those prisoners that are currently on death row. A May 22, 2013 article in the *Las Vegas Review Journal* quotes Corrections Department Director Greg Cox as stating that the current gas chamber at the now closed Nevada State Prison is not compliant with the Americans with Disabilities Act and the viewing area provides little room for official and unofficial witnesses. See *LVRJ Article, May 22,* 2013 attached hereto as Exhibit "22." Director Cox goes on to state that he would "expect litigation to be filed challenging the use of the chamber [at Nevada State Prison] if an execution was to go forward." *Id.* Further, attempts to build another facility have been stymied by the Nevada legislature. The joint Assembly Ways and Senate Finance subcommittee unanimously voted not to fund construction of a new $700,000.00 facility at Ely state prison. *Id.* As it stands, there is no acceptable facility in Nevada to carry out an execution.

A. Nevada cannot continue to allow for the imposition of the Death Penalty.

The fiscal impact of the death penalty can not be analyzed in a vacuum. These costs must be considered in tandem with the current economic climate in both the nation, as well as Nevada. For example, the median home value in Nevada is $152,000, compared with $356,000 in California. See *Zillow Report*, attached hereto as Exhibit "23." One in sixteen (1 in 16) Nevada homes are in foreclosure, compared to one in sixty-nine (1 in 69) nationally. *See Nevada's Triple Economic Whammy, CNN Money* attached hereto as Exhibit "24." Further, the percentage of homes that are financially "underwater" is a staggering 52.4% compared to 21.5% nationwide. *See Nevada Leads in Underwater Homes as Market Improves, Mar. 20, 2013* attached hereto as Exhibit "25"; *See also LA Times article, Mar. 19, 2013* attached hereto as Exhibit "26." The United States Bureau of Labor Statistics reports that Nevada has the **highest employment rate** in

the nation at **9.6%**[1]. See *BSL Report*, attached as Exhibit "27." Further, Nevada's unemployment rate is significantly higher than the 7.6% unemployment rate nationally. Currently, the median income for Nevadans is $44,581, compared to $45,790 nationally. *See* Exhibit "24." Nearly 7.5% of two parent households, and **20.5% of single family households** live under the poverty line. *Id.*

Nevada has been entrenched in an economic crisis, even more so than the overall crisis that swept the country. Nevada has suffered more economic harm than the jurisdictions that have already abolished the death penalty for fiscal reasons.

B. Assembly Bill 444

Most recently, on May 17, 2013, the Nevada legislature passed Assembly Bill 444, which calls for an audit of the fiscal costs of the death penalty. See *Assembly Bill 444* attached hereto as Exhibit "28." This Act calls for the Legislative Auditor to conduct an audit of the costs of legal counsel involved in the prosecution and defense for all capital pre-trial, trial, and post-conviction proceedings. *Id.* Further, the audit must include the disparate costs for investigators, experts, mitigation specialists, court costs, jury costs, as well as the costs of incarceration and the actual execution. *Id.* The final report of the legislative auditor is due no later than January 31, 2015. *Id.*

The passage of this act demonstrates the growing awareness of the impracticability of capital punishment in the State of Nevada. The taxpayers are fronting increasing costs in order to prosecute capital cases, and seeing little if no return on their investment. However, the State continues to prosecute death penalty cases despite these diminishing returns. The undersigned has personally addressed these very issues with the District Attorney's Death Penalty Review committee on similar cases to argue the efficacy and fiscal cost of the death penalty, to no avail.

Despite that these crucial issues have fallen on deaf ears to those that spend the money to prosecute these actions, it appears that these issues have gained traction with the Nevada

[1] In fact, on July 19, 2013, the day of this filing, an article was published in the Las Vegas Review Journal entitled "Jobless Increase in Las Vegas" in Section D, p. 1.

legislature when evaluating the benefit of capital punishment in this State. Much like New Jersey and the other States that have recently abolished the death penalty following a substantive evaluation of the costs versus benefit, Nevada has begun the process of modernizing its legal system. The death penalty cannot be had without significant safeguards to prevent its abuse or misapplication. Such financial safeguards come at a price that is simply not viable in the modern economic climate. As such, the Defendant requests that this Court strike the Notice of Intent to Seek the Death Penalty against him.

In the alternative, Mr. Sims requests that the capital proceedings against him be stayed until the completion of the legislative audit mandated by Assembly Bill 444. Studies in both this State and nearly every American jurisdiction have demonstrated the exorbitant cost of capital prosecutions. The outcome of this audit may well reflect that the costs of death penalty can not be justified by the meager results.

CONCLUSION

For above reasons, the Defendant respectfully requests that this Court strike the Notice of Intent to Seek the Death Penalty Against Defendant Sims. In the alternative Mr. Sims requests that the capital proceedings against him be stayed until the resolution of the audit prescribed in Assembly Bill 444.

DATED this 19 day of July, 2013.

PATTI, SGRO & LEWIS

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of July, 2013, I served a true and correct copy of the foregoing document entitled: MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444 as indicated below:

_____ sending a copy via facsimile to the parties herein, as follows; and/or

X sending a copy via electronic mail, and/or

_____ placing the original copy in a sealed envelope, first-class, postage fully pre-paid thereon, and depositing the envelope in the U.S. mail as Las Vegas, Nevada addressed as follows:

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EXHIBIT 1

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

Seventy-Seventh Session
May 2, 2013

The Committee on Legislative Operations and Elections was called to order by Chair James Ohrenschall at 4:06 p.m. on Thursday, May 2, 2013, in Room 3142 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman James Ohrenschall, Chair
Assemblywoman Lucy Flores, Vice Chair
Assemblyman Elliot T. Anderson
Assemblyman Wesley Duncan
Assemblyman Pat Hickey
Assemblyman Andrew Martin
Assemblyman James Oscarson
Assemblyman Tyrone Thompson

COMMITTEE MEMBERS ABSENT:

Assemblywoman Marilyn K. Kirkpatrick (excused)
Assemblyman Harvey J. Munford (excused)

GUEST LEGISLATORS PRESENT:

Senator Pete Goicoechea, Senatorial District No. 19
Assemblyman John Ellison, Assembly District No. 33
Senator Tick Segerblom, Clark County Senatorial District No. 3
Senator Michael Roberson, Clark County Senatorial District No. 20
Senator Joyce Woodhouse, Clark County Senatorial District No. 5
Senator Justin C. Jones, Clark County Senatorial District No. 9

STAFF MEMBERS PRESENT:

Susan Scholley, Committee Policy Analyst
Kevin Powers, Committee Counsel
Karen Pugh, Committee Secretary
Macy Young, Committee Assistant

OTHERS PRESENT:

Steve Bradhurst, Executive Director, Central Nevada Regional Water Authority
Andy Belanger, Management Services Manager, Southern Nevada Water Authority
Jason King, P.E., State Engineer, Division of Water Resources, Department of Conservation and Natural Resources
Jayne Harkins, P.E., Executive Director, Colorado River Commission
Steve Walker, representing Truckee Meadows Water Authority
Nancy E. Hart, representing Nevada Coalition Against the Death Penalty
Michael Pescetta, Private Citizen, Las Vegas, Nevada
Scott Coffee, Attorney, Office of the Public Defender, Clark County
Steve Yeager, Attorney, Office of the Public Defender, Clark County
Marlene Lockard, representing Nevada Women's Lobby
Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada
Stacey Shinn, representing Progressive Leadership Alliance of Nevada
Allan Smith, representing Religious Alliance in Nevada
John T. Jones, representing Nevada District Attorneys Association
Wes Henderson, Executive Director, Nevada League of Cities and Municipalities
Javier Trujillo, Intergovernmental Relations Manager, City of Henderson
Liane Lee, representing City of Las Vegas
Jeffrey Fontaine, representing Nevada Association of Counties
Barry Gold, representing AARP of Nevada
Martin Bibb, Executive Director, Retired Public Employees of Nevada
Tina Gerber-Winn, Deputy Administrator, Aging and Disability Services Division, Department of Health and Human Services

Chair Ohrenschall:
[Roll was taken.] Today we are going to start with Assembly Bill 301.

Assembly Bill 301: **Requires the Legislative Committee on Public Lands to conduct a study concerning water conservation and alternative sources of water for Nevada communities. (BDR S-807)**

Assemblyman James Oscarson, Assembly District No. 36:
With me today is Steve Bradhurst from the Central Nevada Regional Water Authority and Andy Belanger from the Southern Nevada Water Authority. We have been fortunate to work together on this measure and to reach agreement on a key amendment to this bill. Assembly Bill 301 speaks to a very important issue to my constituents and to the state as a whole—which is water. Since we are overdue for a water study and money is tight, I am not proposing a separate interim study. Instead, the bill asks the Legislative Committee on Public Lands to study the issues. [Read from prepared testimony (Exhibit C).]

Chair Ohrenschall:
You know, a lot of people told me that this bill was all wet. But I am glad that you moved forward and decided to press on. Are there any questions for Assemblyman Oscarson? [There were none.]

Steve Bradhurst, Executive Director, Central Nevada Regional Water Authority:
The Central Nevada Regional Water Authority is an eight-county unit of local govemment that covers 65 percent of the state. The Central Nevada Regional Water Authority supports the bill and the amendment. [Read from written testimony presented to the Committee (Exhibit D).]

When it is all said and done, Assembly Bill 301 is about water supply, an issue on the front burner in Nevada that speaks to the value of our natural resources and economic well-being. [Read from prepared text (Exhibit D).]

The amendment before you is supported by both the Central Nevada Regional Water Authority and the Southern Nevada Water Authority (Exhibit E). I would like to draw your attention to page 1, lines 3 through 6 of the bill, where it states that Nevada is one of the most arid states in the U.S. Actually, Nevada is the most arid state in the United States. [Read from prepared text (Exhibit D).]

Section 1 of the amendment details what water conservation and alternative sources of water should be examined. The definition of alternative sources of water is not all-inclusive, but if you take a look at the second page of the amendment, it talks about "interbasin transfers of water, agricultural water conservation, urban water conservation, cloud seeding, and water reuse, such as reclaiming wastewater, using graywater or capturing rainwater." [Read from proposed amendment (Exhibit E).]

The water in Nevada belongs to the people and is a public asset. As the Legislature represents the public, it seems appropriate that the legislative committee responsible for water issues, the Public Lands Committee, take a

look at alternative sources of water, and water supply in general, during the interim.

Andy Belanger, Management Services Manager, Southern Nevada Water Authority:
The Water Authority has a long history of looking at alternate sources of water. We believe that a portfolio approach to water use is the best way to make sure that we have water in times of drought. If we get all of our water from a single source, it can put us in a really bad situation if that one source of water is affected by drought, climate change, or any other adverse condition. In 2006, we supported an augmentation study of the Colorado River and this last year we participated in the Colorado River Basin Study, which looked at the possible shortages that may occur on the river over the next 50 years. It is possible that we could see a regional shortage on the river of between 3 million and 8 million acre feet of water. That is a staggering amount of water. The low range of that estimate is 10 times the amount of water Nevada receives.

There is a significant need to study alternate sources of water. Conservation is always the cheapest way to expand a water resource. We are pleased that the amendment focuses on that. It provides an opportunity for us to study how the state is doing in water conservation and allows us to look at all alternate sources of water, including interbasin transfers, and at agricultural and urban water conservation.

Chair Ohrenschall:
Are there any questions?

Assemblyman Martin:
Assemblyman Oscarson, we have had several conversations off line about desalination of ocean water. Section 1, subsection 1, paragraph (c) of the bill directs the study to consider desalination. To expand on this, I am wondering if there has been any contemplation of some kind of exchange, such as generating solar power for export to California in exchange for water. Is there any contemplation of working together similar to the Southwestern Renewable Energy Conference concept?

Assemblyman Oscarson:
The study would give all those options to us. When you talk about desalinization and the different ways that it can be done, whether trading power for water or something else, I think that is exactly what this study is about. We would examine all of those options over the interim and bring that information back in a clearly focused study that would identify those opportunities.

Chair Ohrenschall:
It seems we got the short end of the stick in dividing up the Colorado River water. Do you think the study should look at trying to reopen the U.S. Supreme Court case *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963) to see if we could get more?

Andy Belanger:
The Colorado River Compact, codified by Congress in 1928, is the basis of how water is divided among the seven basin states. In 1944, Mexico received an apportionment of the river. I think all seven states recognize that any attempt to reopen the base allocations would necessitate truing up the actual flows on the river. Unfortunately, when we divided the river we based it on a very optimistic look at how much water flowed into it. It is at least 2 million acre feet over appropriated, and that figure could be considerably more as climate change affects us. Opening up the compact requires every state to agree, and it has to be approved by Congress, which is a difficult thing to do.

The upshot is that the seven basin states can decide to make changes inside the confines of the compact. While we may not be able to change the base allocations, we can do several things. We have partnered with California and Arizona on desalination efforts in Yuma, partnered with Mexico on efforts to line agricultural ditches to save water and bank it. There is a lot of flexibility that the basin states can exercise, but changing the base allocations of the basin states is something that would be very difficult to do.

Chair Ohrenschall:
Thank you for explaining that. This question is directed to Mr. Bradhurst. Some arid states allow people to purchase water and have it trucked in as a supply of water for their home or farm. Nevada does not. I wondered if you could expand on why that is and if that might be something the committee would want to look at.

Steve Bradhurst:
I will attempt to answer that question; however, sitting behind me is the State Engineer, who is probably far more qualified to answer it. As a former elected county commissioner and director of a water utility, on the surface I can tell you that it seems you are on thin ice when you allow a development to be based on water trucked in from another source. The focus for a water purveyor is whether or not there is an identified, sustainable water supply. If you are trucking water in for a development, the question would be whether that is a sustainable water supply for the future, and if not, where do you go to get water?

Chair Ohrenschall:
Are there any other questions from the Committee? [There were none.]

Senator Pete Goicoechea, Senatorial District No. 19:
Most of you know I am very passionate about water and concerned about the over appropriation of water in Nevada, whether it be ground or surface water. I think we are rapidly approaching the cliff and therefore I am very supportive of this bill. The study is appropriate and there is no fiscal note. If Public Lands can absorb this study, I believe it would be good for Nevada.

Chair Ohrenschall:
Are there any questions for Senator Goicoechea?

Assemblyman Thompson:
It sounds as if this is an urgent matter. Why would the report not be ready until February 1, 2015?

Senator Goicoechea:
Typically these committee studies work through the interim and report back at the next legislative session, which would be February 1, 2015. We would then have the opportunity as legislators to take action on what we see as concerns.

This study is going to collect a lot of data as far as the drought is concerned. It looks like we are going into another very dry year, especially here in the north. Realistically, a ten-year study would be appropriate, if you want to get baseline data. But for an interim study, we can look for alternative sources of water, such as desalination and graywater, as well as conservation of water. Some of our groundwater basins, such as Diamond Valley and the Pahrump Valley in my district, are significantly over appropriated. But until we have accurate data, it is hard to say what should be done.

Chair Ohrenschall:
Are there any other questions for the Senator? [There were none.]

Assemblyman John Ellison, Assembly District No. 33:
I support A.B. 301 because I believe this is an important study. I remember last session when desalination came up in committees that many of us were on. I think this is a way to start to look at this area and several different possibilities for the future.

Chair Ohrenschall:
Are there any questions for Assemblyman Ellison? [There were none.]

Jason King, P.E., State Engineer, Division of Water Resources, Department of Conservation and Natural Resources:
Our office is obviously in support of this bill. Any bill that looks to study ways to stretch our limited water supply is something we are in favor of.

Chair Ohrenschall:
I asked Mr. Bradhurst about people purchasing water and having it brought out. Why does it work in other states but is not a good fit for Nevada?

Jason King:
I would like to answer that question in two parts. The answer that Mr. Bradhurst gave you is true in terms of a subdivision of homes being supplied with water. Our office, for example, has signatory authority over all subdivisions built in the state. Before we can sign off on a subdivision we have to get what is called a "will serve letter" from the local purveyor—such as the Truckee Meadows Water Authority, the Southern Nevada Water Authority, or Tonopah Public Utilities—that says whether they have the water available to serve these 50 homes in the subdivision. Based on that "will serve letter," we will sign off on that subdivision map.

If there is a single-family dwelling on a domestic well that goes dry, they are then looking for an alternate water source and there is no municipality nearby to serve that home. I have been asked before whether that homeowner could truck water in, and the answer is that we are okay with that. I know sometimes the homeowner has trouble with the local government because they have an issue with trucked-in water, but frankly that is not something in our statute that we would disallow. A caveat would be if they were going to deliver water from Washoe County. Our office would want to make sure that Washoe County had a water right for municipal use that covered this single-family dwelling. Other than that, we would not have a problem.

Chair Ohrenschall:
Are there any other questions? [There were none.] Is there anyone else here in support of A.B. 301?

Jayne Harkins, P.E., Executive Director, Colorado River Commission of Nevada:
We are the state agency that holds the water rights on the Colorado River and the hydropower generated on the Colorado River for the benefit of the state of Nevada. I want to state for the Committee that we support the bill as amended. The Colorado River Commission is available to assist the Legislative Committee on Public Lands with this study.

Chair Ohrenschall:
Are there any questions for Ms. Harkins? [There were none.] Is there anyone in opposition to A.B. 301? [There was no response.] Is there anyone who is neutral who would like to be heard?

Steve Walker, representing Truckee Meadows Water Authority:
The Truckee Meadows Water Authority Board is neutral on the bill. We have looked at our water resources and have planned for them over the next 30 years under a variety of population scenarios, and believe we have adequate ground and surface water resources. We will gladly participate in the study, but I do not think our entity is the focus.

Chair Ohrenschall:
Are there any questions for Mr. Walker? [There were none.] Are there any closing remarks you would like to make, Assemblyman Oscarson?

Assemblyman Oscarson:
I think you have heard today from experts with multiple years of knowledge on water issues. I appreciate every one of them coming and testifying and helping us to work this through.

[Assemblyman Oscarson submitted a written statement from the Nye County Water District indicating support of A.B. 301 (Exhibit F).]

Chair Ohrenschall:
I will now close the hearing on Assembly Bill 301 and open the hearing on Assembly Bill 444, which is a Committee bill that will be presented by Nancy Hart.

Assembly Bill 444: **Provides for an audit of the fiscal costs of the death penalty. (BDR S-817)**

Nancy E. Hart, representing Nevada Coalition Against the Death Penalty:
It is my pleasure to introduce Assembly Bill 444, which as Chair Ohrenschall mentioned is a Committee bill. This bill is almost identical to a bill from last session, Assembly Bill No. 501 of the 76th Session, which was passed by the Legislature but vetoed by the Governor. Nevada continues to spend an enormous amount of money maintaining its death penalty. One example of that is this legislative body, through the Assembly Ways and Means Committee, has been considering whether to spend $700,000 on a new execution chamber. We believe an in-depth study of the cost of Nevada's death penalty is warranted. Decisions about how and whether the death penalty works rest squarely on lawmakers' shoulders. When so much is at stake, legislators should

have complete information available to them, including information about the fiscal impact of maintaining a death penalty system.

The Governor's veto message expressed concerns about a lack of specificity in certain areas of A.B. No. 501 of the 76th Session. Assembly Bill 444 has been specifically drafted to address those concerns. Subsections 3, 4, and 5 of section 1 of the bill all include additional details about factoring in litigation choices, auditing standards, and methodologies, which the Governor's veto message expressed concern about. At this time, I would like to defer to Michael Pescetta and Scott Coffee, who are testifying from Las Vegas, and I will resume with further remarks after their presentations.

Chair Ohrenschall:
Ms. Hart, Senator Segerblom is here and if you do not mind, I would like to ask him to comment first. Senator Segerblom carried this legislation during the last two sessions.

Senator Tick Segerblom, Clark County Senatorial District No. 3:
This bill is an example of doing the same thing over and over again and expecting a different result, but you never know—it sometimes works. The death penalty clearly does not. We prosecute too many people, and a study of the current system, to determine why there are so many death penalty charges, is needed. Did you know the cost to prosecute a death penalty case is double that of a case involving life without the possibility of parole? If there is a way to reduce the number of people that are charged and reduce that cost, it would be a great savings for our state. That is why I think we have to do this audit. It will be done by staff so there is no additional cost to the state.

Chair Ohrenschall:
Ms. Hart mentioned the Governor's 2011 veto message and his concerns about specificity. The Committee, our Legislative Counsel Bureau staff, and I have incorporated all those concerns into Assembly Bill 444. Are there any questions for Senator Segerblom?

Assemblyman Hickey:
As someone who voted for this study last time in this Committee and is part of the discussion going on in Ways and Means about the need for building an execution chamber, one of the things that occurred to me during that testimony is how often executions do not happen in this state. There are a myriad of legal reasons for that. I am wondering what is better about this bill as opposed to last session's bill.

Senator Segerblom:
As far as being better, I think it is because you have addressed the concerns that the Governor raised in his veto message. The reality is that the same issue remains. Why would Clark County have as many people being charged with the death penalty as Los Angeles County? Why does Washoe County have one person being charged and Clark County has 80 (Exhibit G)? Something is out of whack. Given the astronomical cost when the death penalty is designated, the tight resources, and the fact that people are not being executed—we do not even have an execution chamber—it is one of those things that is ripe to be investigated.

Nancy Hart:
You are right that there have been relatively few executions in Nevada. Since 1977, when it became legal to execute again, we have executed 12 people. But there are 79 individuals on Nevada's death row (Exhibit H), and as Senator Segerblom has mentioned, about 80 additional cases that are pending in Clark County. We are using the death penalty and spending enormous amounts of money maintaining a death penalty system. We are creating a backlog, and there will come a time, if we do not get rid of the death penalty, when all of those people will be executed. The costs continue to accrue even if we are not carrying out executions as often as one might think we ought to.

Assemblyman Hickey:
The problem that you are hinting at is sentencing resulting in death penalty decisions all too often. So a study is going to get at whether that is the appropriate sentence or not. Do we need to change other laws and does a study like this lead towards that?

Senator Segerblom:
I believe it could, if you look at the nature of the cases that are being charged and ask if we have too many criteria that make a case death penalty-eligible. Why would Clark County have as many as Los Angeles County? Maybe we can establish a review panel where only the top cases are reviewed by outside experts to decide whether to pursue the death penalty. It is easy to say this is a horrendous crime and we need to do it, but wiser heads have to step back and say this is going to cost $1 million and we have a lot of things we can do with $1 million other than try to prosecute somebody who is never going to be executed.

Chair Ohrenschall:
Mr. Hickey, the costs do not start at sentencing; they start once the prosecution decides they are going to seek the death penalty. Should the

Legislature approve it, I hope this audit will find whether this cost is worth it. The deterrent effect versus other sentences—is it worth it?

Assemblyman Martin:
I like the idea, but my concern is what is a differential cost, meaning what would be an expense anyway if the case was not involved with the death penalty? Is this audit going to be patterned after what other states have done in terms of methodology? If you pardon the nonemotional nature of this, as an appendix to an audit report you might typically see a cost per conviction, or something to that effect, which you want to be able to compare.

Senator Segerblom:
That is why we have an auditor on that committee, so we can refine the bill.

Nancy Hart:
In section 1, subsection 2 of the bill, it specifies what parts of the procedure will be looked at and the methodologies and auditing practices that will be followed. In regard to the emotional factors that you mentioned, the studies that have taken place in other states, as well as the study that this bill contemplates, do not take those into account. They are very objectively identifiable costs.

Assemblyman Martin:
I am looking at it as a very nonemotional analysis. Are you aware of any other states that have done such an analysis and what costs they introduce? That way you can compare the results. That is where I was heading with that.

Nancy Hart:
One of the handouts on the Nevada Electronic Legislative Information System (NELIS) is from the Death Penalty Information Center, which is a national resource center on death penalty issues. It summarizes many state studies on the cost of the death penalty in those states (Exhibit G). I believe that Mr. Pescetta and Mr. Coffee will be alluding to some of those studies as well. All could be something against which the Nevada cost study can be compared.

Chair Ohrenschall:
Are there any further questions for Ms. Hart or Senator Segerblom? [There were none.]

Michael Pescetta, Private Citizen, Las Vegas, Nevada:
I am an attorney practicing in the area of death penalty cases and post-conviction remedies. I am appearing on my own behalf and not as a representative of the federal public defender, who is my employer, and my opinions are offered as my own. My primary purpose here is that our office, in the course of litigating cases, has generated most of the statistics that are available and that have been submitted to the Committee (Exhibit H). We maintain these records for our own purposes, but we share them, as anyone who wants them knows.

My view, for purposes of this bill, is purely fiscal. In the 36 years since the death penalty was reinstituted in 1977, there have been, by our estimation, 151 death sentences imposed in Nevada. [Referred to page 8 of the handout Exhibit H).] As of last October, 55 of those 151 sentences, or 36.4 percent, have been reversed at some point. It is my feeling that any state program which has a 36 percent failure rate should be examined to see if it is worth the effort. What we have in terms of product, if you will, from the death penalty statute and procedure in Nevada, is that we have executed one individual since 1977 involuntarily. There have been 11 inmates sentenced to death in that period who have given up their appeals and have volunteered to be executed. For a system that has litigated 151 death penalty cases over the past 36 years, this seems like a fairly modest achievement in terms of actual executions and one that does not represent a cost-effective system.

Chair Ohrenschall:
Mr. Pescetta, I want to make sure I have those figures right. There have been 151 death sentences imposed in Nevada since the Supreme Court reinstituted it, resulting in 1 involuntary execution and 11 voluntary?

Michael Pescetta:
That is correct. You can find that information on the page entitled "The Death Penalty in Nevada Since 1977," which is page 8 of the fact sheet handout (Exhibit H), that was distributed by Ms. Hart.

I am not here to complain that there have not been enough executions. However, considering that over a third of the cases have been reversed by either state or federal courts, and resolved by sentences less than death or by the death of the inmate from some other cause, this is something where what Mr. Martin referred to as the differential becomes of interest.

Ms. Hart referred to the studies that have been conducted in other states (Exhibit G), some of which were conducted by private institutions. The Texas study was conducted by *The Dallas Morning News*, which is a newspaper.

A study in Maryland was conducted by its state auditors. Very consistently, the results of these studies have shown that imposing the death penalty, and litigating death penalty cases, is significantly more expensive than imposing a sentence of life without possibility of parole. Texas, I believe, is responsible for one-third of all the executions that have occurred since the U.S. Supreme Court allowed the current death penalty systems in the states to be enacted in 1976. But even in Texas, the average time between imposition of a death sentence and execution is about 10 years. The cost is about three times to obtain an execution than it is simply to impose a sentence of life without possibility of parole. That to me is a fiscal argument for why this system needs to be overhauled. It is not about putting me out of a job, although I would gladly be out of a job. I think it is something that every legislator has to consider for himself or herself: is this worth the amount of money that we are spending on it?

We have a very high per capita imposition of the death penalty. In Nevada, we have consistently had either the highest or second highest per capita death row population in the country. But we do not execute very often, and we have a very high error rate, where over a third of the cases in which the death penalty is imposed have it legally vacated.

There are a variety of approaches that the Legislature can take to address the situation. One, as the Chair indicated, is to study whether a reduction in the number of aggravating factors which allow imposition of the death penalty would be an appropriate way to restrict the use of the death penalty and to ensure that only the most serious cases receive it. Whether the death penalty is worth the cost at all is another analysis that the Legislature will have to make for itself.

I believe that in terms of pure fiscal impact the death penalty does not work very well. I believe that there has never been any real showing of deterrent effect. Every year the homicide rate is released. Sometimes it is up and sometimes it is down, but when it is released, someone from the Metropolitan Police Department in Las Vegas always says we do not really know why this is happening. No one in law enforcement, to my knowledge, has ever tried to make a claim that the ups and downs of the homicide rate, or the crime rate generally, are in any way related to the existence or nonexistence of the death penalty as an appropriate option. From my own experience in litigating these cases on behalf of my own clients, I think that it is also entirely arbitrary. With very few exceptions, you could, I believe, put a description of all of the death sentences that have been returned into a hat and draw those descriptions out, and you would not normally be able to identify which case resulted in a death penalty and which did not. I view that as an issue of

fairness. However, I think what you would be studying is not fairness but cost, and at that point putting yourselves in a position to make a rational and dispassionate judgment of whether what we are getting from the system is worth the money that we pay for it.

Some people are not as familiar as we assume with the death penalty system. A capital case is prosecuted in the state district court by an indictment or information. Once that is filed, the prosecution files a notice that says whether it will attempt to seek the death penalty in the case. At that point, all of the protections, which involve increased costs imposed by Supreme Court Rule No. 250, the primary court rule applying to death penalty cases, go into effect. Then the other protections in the statutes kick in, and those costs—for investigating for mitigating evidence, finding expert witnesses, et cetera—begin to be accrued, primarily on the defense side. Even if the case is resolved by a plea negotiation shortly before a scheduled trial, most of the preparation, and therefore the expense, will have been garnered in preparation for the anticipated trial. Once the individual is found guilty of first-degree murder, there is a separate penalty phase that involves increased court time. Choosing a jury that is "death-qualified" and constitutionally able to impose all of the available sentences, takes more court time and attorney time. The penalty phase takes additional time. There are usually more witnesses, including mitigating witnesses who talk about the background of the defendant or about the effect of the offense on the victim's survivors. If a death sentence is then imposed, there is a direct appeal.

Chair Ohrenschall:
I have a question about the mitigating circumstances. Can you give us a ballpark estimate on what this is going to cost? What kind of experts do you have to hire? Do you know of cases where the defense has had to travel to the hometown or home country of the defendant? What kind of expense does that add when you have a death penalty case, and would that expense be there if it were charged as a life without parole instead of the death penalty?

Michael Pescetta:
I think Mr. Coffee could speak with a little more detail to that. When we get a case on habeas corpus, if those kinds of mitigation investigations have not been done, we have to do them. We have had to conduct investigations for defendants who were born and raised in Cuba. We have a client who was born and raised in Serbia. We had to conduct the mitigation investigation almost 20 years after the imposition of the death penalty because it was not carried out prior to trial. That cost a great deal of money. It is many thousands of dollars if you have questions of brain damage. Typically, you have to have both a psychiatric expert and a neuropsychological expert and sometimes imaging

costs for MRIs. Those kinds of experts are by no means cheap. Experts typically cost between $10,000 and $15,000 apiece for conducting serious investigations of this sort.

I would like to finish with the procedural steps involved after a death sentence is imposed. There is an automatic and mandatory appeal to the Nevada Supreme Court. The briefing is larger in the Nevada Supreme Court by rule. The Supreme Court reviews a death sentence sitting en banc, as a full court instead of in panels. If the Nevada Supreme Court does not grant relief, there is particularly a petition for certiorari to the United States Supreme Court. If the case is not taken, the case goes back to the state district court, where a post-conviction habeas corpus petition is filed. In that litigation, appointment of counsel for the defendant is mandatory. The state is represented by the Office of the District Attorney. If no relief is furnished in that proceeding, a question of whether trial and appellate counsel are ineffective may be raised. In order to litigate that it is typically necessary to show what would have happened if the trial and appellate counsel had done the things that they did not do. If that rather costly procedure does not result in relief, there is an appeal to the Nevada Supreme Court again, and from there the case goes on to federal court, where the federal public defender typically picks up representation of the defendant.

We then litigate in the federal district court, where the state is usually represented by the Nevada Attorney General. That frequently results in a new petition in the state district court to exhaust federal constitutional claims, because under federal procedure a federal court cannot address an issue that has not already been presented to the state court system. Throughout these proceedings, because almost universally capital defendants are indigent, all of those costs are paid for one way or another by the taxpayers.

It is a very considerable burden to go through, and the result is we have achieved reversals in over one-third of the cases in which death sentences have been imposed. The cost of imposing those death sentences and litigating those cases has essentially been lost permanently.

I believe that if the Legislature adopts this bill, it will at least give you a rational ability to see what the system is costing in order to make a determination on purely fiscal grounds whether it is a system that ought to be retained.

Chair Ohrenschall:
We will go to Mr. Coffee next and then take questions from the Committee.

Scott Coffee, Attorney, Office of the Public Defender, Clark County:
I have been an attorney with the Clark County Public Defender's Office for the past 17 years and have been on the Homicide Unit litigating these cases for the past 12 years. I have been responsible for the resolution, meaning either the trial or the plea, of approximately 75 murder cases and 10 death penalty cases. I have some idea of what happens on the front lines. The cost is astronomical. Dr. Terance Miethe, a criminal justice professor and statistician at the University of Nevada, Las Vegas (UNLV) did a commissioned report for the Clark County Commission last year. He looked at costs just for defense trial attorneys on death penalty cases and came up with between $170,000 and $210,000 per filing at the trial level. That is without expert witnesses, which are $10,000 to $20,000 every case, and perhaps more. That is without travel. That is without mitigation experts. That is before we ever get to what Mr. Pescetta just talked about. They did a time study and found that defense attorneys at the trial level were spending about twice the time on a death penalty case as they would on a non-death penalty case. I will tell you that is consistent with my years in practice.

Chair Ohrenschall:
Was this study limited to only those cases represented by the Office of the Public Defender?

Scott Coffee:
No, it was private counsel and the Office of the Public Defender. The thing to keep in mind is that out of about 80 pending death penalty cases in Clark County, one has retained counsel and the others are paid for at taxpayer expense. The majority of people charged with the death penalty cannot afford the cost of litigation. Our office represents perhaps a third of those cases, the Special Public Defender takes another third, and about a third has appointed counsel, which again is at taxpayer expense.

Why are these costs so astronomical? Mr. Pescetta mentioned 151 death sentences in Nevada. You have to think about how many cases were filed to get that many sentences. In Dr. Miethe's study, there were 35 death filings and seven death verdicts returned. That is a 1 in 7 rate. If we apply that to the 151 death sentences that Nevada has had, we are talking about 1,000 death filings. Now we see why the numbers can be so astronomical. Every time a death penalty case is filed, the costs go out the window. The studies that have looked at these costs—in California, Kentucky, and Maryland—have found the costs to be in the millions of dollars. So in Nevada we are talking 151 death sentences, out of perhaps as many as 1,000 filings, with 1 nonvolunteer executed. You see why costs soar even if the marginal cost on a case is low.

Dr. Miethe's study concluded that the 80 pending cases in Clark County would cost the taxpayers $15 million in additional defense attorney costs alone. That is pre-expert, pre-travel, and pre-mitigation. Of those 80 cases, at the current rate we could expect 10 death sentences, so that is $1.5 million per death sentence. Of those, three are going to be overturned and we may have no executions. That is a 1 in 10 chance of executing a person in any of the 80 pending cases. If you look at the numbers that way, you can see why a study is important.

There are certain things that a study needs to take into consideration. I think the cost per execution, including the cost per volunteer and per nonvolunteer, is absolutely critical to any study that is being done. I think the study needs to take a look at county versus state costs, because there is some disparity. To some extent, Clark County is the tail wagging the dog in this whole death penalty shell game, because we have 80 pending cases in Clark County and there is one in the remainder of the state. In the post-conviction phase if we do get those 10 death sentences, the state ends up footing a good part of the bill, despite the fact that Clark County is the entity filing those cases. State versus county costs is important for everybody to know.

I think it is also important that practitioners are included in any cost study. You should consult with practitioners, because there are a number of places that money is spent that might surprise you. For example, one of the things not mentioned in the list under section 1, subsection 2 is lay witnesses. It talks about expert witnesses but not about lay witnesses. In a death penalty situation, the lay witness cost is substantial, particularly if I have to fly people in from around the country or around the world to testify on behalf of the defendant. I have clients who were born in Cuba, Korea, and Mexico. If those cases go to trial, I will be flying in family members from all those destinations. That is a substantial cost. Again, I would encourage that any cost study include discussions with practitioners, so that you know where to look and where the dollars are going.

Chair Ohrenschall:
Some people have expressed a concern that this is a first step to abolition. I looked online and saw that Kansas conducted a study and found that it was 70 percent more expensive for death penalty case versus a non-death penalty case, but they still have the death penalty on the books. Do you know whether most of the states that have conducted a cost study have gone on to abolish the death penalty, or have they just had that information available for their legislators and their citizens?

Scott Coffee:
It is ultimately a choice for the legislators and the citizens. California just turned down a referendum to get rid of the death penalty, and there was a study pending in California which showed a cost of $20 million per execution. The California voters decided to keep the death penalty on the books.

Chair Ohrenschall:
What do you envision this study will provide that the study conducted by Dr. Miethe at UNLV did not?

Scott Coffee:
I would hope that this study is comprehensive. One of the things that A.B. 444 talks about is the costs of prosecution. That was not in any of the previous studies. The cost of courtroom time was not included, nor was the cost of experts, travel, appeals, post-conviction proceedings, and housing in the prison. None of those things were covered in the limited study Dr. Miethe did. Dr. Miethe's limited study showed a cost of approximately $1.5 million for every death sentence without considering those additional things.

Chair Ohrenschall:
Are there any questions for Mr. Pescetta or Mr. Coffee? [There were none.] Is there anyone else who would like to speak in favor of Assembly Bill 444?

Nancy Hart:
Professor Miethe's study also did not include the cost of prosecution, at trial or any other stage. I wanted to respond to the fact that of the states that have conducted cost studies summarized in the Death Penalty Information Center handout on NELIS (Exhibit G), not even half of those states have elected to end their death penalties. Some states have conducted these studies and concluded that they are not going to move forward with that.

Chair Ohrenschall:
That it is a cost that they are willing to bear.

Nancy Hart:
At this point, yes.

Steve Yeager, Attorney, Office of the Public Defender, Clark County:
You heard from Scott Coffee testifying on behalf of our office. I want to formally put a "me too" on the record and would hope that this information would prove valuable down the road for this body to decide how to proceed.

Marlene Lockard, representing Nevada Women's Lobby:
The Nevada Women's Lobby believes in the principle that the lives of all people are inherently valuable and worthy of respect and dignity. Based on this principle and the inequities we see in the death penalty, we support this cost study. In light of the state's financial woes, and the terrible cuts happening to so many vital government programs, it makes sense to take a close look at how much we are spending on our death penalty system. From what we have just heard, maintaining the death penalty is a very expensive public safety program. Like all government-funded programs, its costs should be reviewed and evaluated. Nevada needs to make difficult choices about what we can afford to fund, and lawmakers and taxpayers alike should have accurate and complete information about the cost of maintaining the death penalty.

Chair Ohrenschall:
I think Mr. Pescetta put it best when he mentioned that the study outlined in Assembly Bill 444 is meant to be dispassionate, rational, and logical. I know we all have our feelings about the death penalty, but A.B. 444, if it is enacted, would simply look at the cost to the taxpayers to prosecute a death penalty case versus a nondeath penalty case. Are there any questions for Ms. Lockard? [There were none.]

Vanessa Spinazola, Legislative and Advocacy Director, American Civil Liberties Union of Nevada:
In the broadest terms the death penalty is about the search for justice and the safety of our communities. Many ways exist to make our communities safer and most have associated costs. When the state decides to spend a significant amount of money on one single measure, such as the death penalty, this necessarily means that less money is available for other safety resources. We feel that lawmakers should know the true costs associated with maintaining this form of punishment in our state in order to make informed policy decisions.

Finally, government transparency is absolutely essential when the state takes the extreme measure of taking someone's life. The study proposed in A.B. 444 takes steps towards that transparency, and for that reason we support the bill.

Chair Ohrenschall:
That is a good point. This does have a lot to do with transparency. Are there any questions for Ms. Spinazola? [There were none.]

Stacey Shinn, representing Progressive Leadership Alliance of Nevada:
We work on issues that affect at-risk communities and feel this is a piece of legislation that is crucial. I know you are just discussing cost, but at the same time we are looking at this bill as a Racial Equity Report Card bill, because

almost 40 percent of our inmates facing execution in Nevada are African Americans, while African Americans represent only 8 percent of the state's population. There is not only a financial aspect of saving money for our state but it is also the cost of lives. People say that the death penalty is a deterrent to crime, but this has been proven not to be true. The death penalty minimally addresses the problem of violent crime in our state. We urge your support on A.B. 444.

Chair Ohrenschall:
Are there any questions for Ms. Shinn? [There were none.]

Allan Smith, representing Religious Alliance in Nevada:
Originally, the Religious Alliance in Nevada (RAIN) was neutral on this bill, but I have since gotten word from my board that we are in favor of this bill. In fact, recent communication with board member Tim O'Callaghan suggested I let you know we support this bill. We feel it is important that this audit be completed and that other issues need to be looked at.

Chair Ohrenschall:
Does RAIN and the affiliate churches and temples assist any of the families of the victims associated when a death penalty is sought?

Allan Smith:
We act as an advocacy group and help where we can, mainly with issues on prisoner reentry and matters like that.

Chair Ohrenschall:
If the study does happen, perhaps you could speak to the auditor about that. Is there anyone else in favor of A.B. 444? [There was no response.] We will now go to opposition. Is there anyone who would like to speak against Assembly Bill 444? [There was no response.] Now I will turn to neutral. Is there anyone who is neutral on the measure and would like to be heard?

John T. Jones, representing Nevada District Attorneys Association:
We are neutral on A.B. 444. It is my understanding we were neutral last session on the measure and we are remaining in that position.

Chair Ohrenschall:
Are there any questions for Mr. Jones? [There were none.] I hope that the Committee will consider this bill. We worked hard to craft something that is fair. If the Committee will look at page 2 of the bill, lines 24 through 31, you will see that the auditor is not to just look at the costs of pursuing a death sentence; the auditor is to look at any potential cost savings of seeking

a death sentence. I believe that the measure is balanced; it would look at all sides in that dispassionate, logical, and rational manner that Mr. Pescetta mentioned. We will now close the hearing on Assembly Bill 444. Before we move on to the next bill we have a work session.

Senate Joint Resolution 5 (1st Reprint): **Urges Congress to pass the Marketplace Fairness Act. (BDR R-697)**

Susan Scholley, Committee Policy Analyst:
The bill before you is Senate Joint Resolution 5 (1st Reprint) urging Congress to pass the Marketplace Fairness Act. The bill was sponsored by Senator Woodhouse and others and was heard in this Committee on April 25, 2013. [Read from work session document (Exhibit I).]

Chair Ohrenschall:
My recollection was there was no testimony in opposition. I have had conversations with Senator Woodhouse and she has mentioned that the U.S. Senate may take this measure up on Monday. That is one of the reasons why we are trying to move it so quickly. I will open it up to a motion to do pass.

> ASSEMBLYWOMAN FLORES MOVED TO DO PASS SENATE JOINT RESOLUTION 5 (1ST REPRINT).
>
> ASSEMBLYMAN MARTIN SECONDED THE MOTION.

Is there any discussion on the motion?

Assemblyman Duncan:
I will be a no vote on this, but I will reserve the right to change my vote on the floor. I do have some concerns, in light of the U.S. Supreme Court case *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). I have some concerns about states using tax authority to go across borders and also discouraging tax competition. I am going to look into this more. I will be a no with a reservation.

Chair Ohrenschall:
Is there any other Committee member who would like to discuss the motion?

Assemblyman Oscarson:
I am going to be a yes while reserving the right to change my vote on the floor. I have heard from multiple constituents in the rural areas who feel that paying

taxes on some of the Internet sales puts them at an unfair competitive disadvantage. For that reason I will be voting yes.

Chair Ohrenschall:
Is there any further discussion?

> THE MOTION PASSED. (ASSEMBLYMAN DUNCAN VOTED NO. ASSEMBLYMEN KIRKPATRICK AND MUNFORD WERE ABSENT FOR THE VOTE.)

We will now open the hearing Senate Bill 202.

Senate Bill 202: **Creates the Nevada Advisory Committee on Intergovernmental Relations as a statutory committee. (BDR 19-905)**

Senator Michael Roberson, Clark County Senatorial District No. 20:
I submitted this bill at the request of Nevada League of Cities and Municipalities President Debra March. This bill seeks to create a permanent Nevada Advisory Committee on Intergovernmental Relations, otherwise known as ACIR, that would create the forum for ongoing dialogue between the Legislature, state agencies, and local elected officials. The goal of ACIR would be to bring about effective partnerships and communication between all levels of government and present those findings to the Legislature. Membership in the ACIR committee would include representatives from the Legislature, local governments and the state Executive Branch. The ACIR was designed to allow for a conversation to take place between different levels of government on increasingly complex governmental issues that are difficult to solve within the 120-day legislative session. By allowing ACIR to meet during the interim and home in on needed changes with how government is delivered, the respective Government Affairs Committees can hit the ground running and accomplish more during the relatively short legislative session.

We have all heard from our constituents who desire a more efficient government. The ACIR can help to do that by exploring interaction between our levels of government and help determine if services are being provided by the appropriate level of government as efficiently as possible. This is just one example of the charge ACIR will have, but I envision this body being tasked by the Legislature to examine other, more complex topics. The bill would allow leadership to appoint their respective Government Affairs Committee chairs to sit on ACIR, which will ensure a better understanding up front of what local governments and the state Executive Branch may be trying to accomplish within proposed bill draft requests (BDRs).

Wes Henderson, Executive Director, Nevada League of Cities and Municipalities:
Our league president, City of Henderson Councilwoman Debra March, could not be here today but asked that I express her appreciation to Senator Roberson and relate her support of S.B. 202 to the Committee. In 2009, Senate Bill No. 264 of the 75th Session created both a Legislative Commission's Committee to Study Powers Delegated to Local Governments and an Interim Technical Advisory Committee for Intergovernmental Relations (ACIR). [Read from prepared text (Exhibit J).]

Chair Ohrenschall:
What is not working now with the local government officials reaching out to the Legislative Commission, Interim Finance Committee, and other interim committees that we have? What do you think ACIR will solve that is not being solved now?

Wes Henderson:
I think ACIR provides a formal body that will meet on a regular basis with the provision to recommend BDRs to be introduced. Looking back on the 2009-2010 ACIR, the process it started was just learning how the other branches of government worked. And that does not exist now. There is no forum to learn how state government and local governments work together.

Chair Ohrenschall:
Is there anyone else in support of Senator Roberson's measure who would like to speak?

Javier Trujillo, Intergovernmental Relations Manager, City of Henderson:
We strongly support this measure, as we believe it would provide a forum for us to meet during the interim to discuss important issues at the local government level with our legislators and state agencies. It would also allow us to work closely with the chairs of the Government Affairs Committees to be able to make recommendations on committee bills that would address local government issues. This creates a conversation before the session on important issues that during a 120-day session might be difficult for the committee to discuss.

Chair Ohrenschall:
Are there any questions for Mr. Trujillo?

Assemblyman Hickey:
Do you anticipate this creating any problems with the Open Meeting Law?

Javier Trujillo:
I do not believe that is a concern. I would certainly defer to legal counsel and the bill's sponsor.

Kevin Powers, Committee Counsel:
To ensure that very thing, the bill provides in section 10 that the committee shall comply with all provisions of the Open Meeting Law.

Chair Ohrenschall:
Are there any other questions for Mr. Trujillo? [There were none.]

Liane Lee, representing City of Las Vegas:
The City of Las Vegas supports S.B. 202 and the intent of fostering effective communication, cooperation, and partnership among state government and local governments to improve the provision of governmental services to the people of the state.

Chair Ohrenschall:
Are there any questions for Ms. Lee? [There were none.]

Jeffrey Fontaine, representing Nevada Association of Counties:
We are in strong support of S.B. 202 for all the reasons that have already been mentioned. There were three county commissioners on the interim advisory committee, including a commissioner from Washoe County, one from Clark County, and one representing a rural county, all meeting with their counterparts from the cities and the Executive Branch staff. That committee was able to delve into the details of the shared services, to try to identify gaps and duplication of services, so we really felt that there were great benefits. By making this a legislative committee we think it can be extremely useful and try to tackle many of the complex issues that come before you every session.

Chair Ohrenschall:
Are there any questions? [There were none.] Is there anyone else who would like to speak in favor of S.B. 202? [There was no response.] Is there anyone opposed to the measure who wishes to speak? [There was no response.] Is there anyone neutral who wants to be heard? [There was no response.] We will now close the hearing on S.B. 202 and open the hearing on Senate Bill 298.

Senate Bill 298: **Requires the Legislative Committee on Senior Citizens, Veterans and Adults with Special Needs to conduct a study concerning property tax assistance for senior citizens. (BDR S-735)**

Senator Joyce Woodhouse, Clark County Senatorial District No. 5:
I have introduced this bill for one simple reason: I want the Legislature to reconsider an action that it took in 2011 in the midst of the budget crisis. That action was to repeal the Senior Citizen's Property Tax Assistance Program. This program provided significant relief to low-income seniors living on fixed incomes and struggling to make ends meet.

As we all know, the true value of a fixed income declines over the years and threatens the ability of some seniors to maintain ownership of their homes. The program helped them by refunding some of the property taxes they paid as homeowners or renters. At the time it was eliminated, it was funded entirely through a General Fund appropriation.

This was started in 1973 and that legislation did establish the program. The Legislature declared that a public policy of the state is to provide assistance to its senior citizens who are carrying an excessive residential property tax burden in relation to their income. In 2001, the program was transferred from the Department of Taxation to the Aging and Disability Services Division in the Department of Health and Human Services because it was thought to be a social service rather than a tax program. At the time it was eliminated, the Executive Budget projected more than 18,000 seniors would apply in that fiscal year for a cost of approximately $5.7 million. On average, approximately 16,000 individuals are found to be eligible to receive the funds each fiscal year. To be eligible a senior had to be at least 62 years of age and have a certain level of income.

Senate Bill 298 simply calls for an existing statutory interim committee, the Legislative Committee on Senior Citizens, Veterans and Adults with Special Needs, to investigate tax relief for senior citizens. The study should include the feasibility of reenacting the Senior Citizens Property Tax Assistance Program and an evaluation of any other alternatives that might be available to provide property tax assistance for our senior citizens. The committee would report its findings and recommendations to the 2015 Legislature.

The Executive Budget recommended elimination of the program to save money, and I certainly understand that decision. The 2009 and 2011 Legislatures were dealing with some devastating fiscal pressures. However, I found myself wondering, especially after a lot of seniors contacted me regarding their situations during various campaigns and also when I served here earlier. I was wondering whether the program was eliminated without a thorough review of the consequences to the seniors who depended on that relief. Back in 1973 it was public policy of Nevada to help low-income seniors living on fixed incomes.

I urge that we take the time to reconsider that public policy again and understand the situations that face our seniors today.

In closing, Senate Bill 298 simply asks that an existing legislative interim committee revisit property tax assistance for senior citizens. After the study, their recommendation may be to reinstitute the program that previously was in place, or it may be that the legislators on the committee will determine and recommend that property tax relief is not warranted. As an alternative, the committee may find and recommend a different program with other eligibility criteria. But at least we can, and should, make an informed decision, and we can make sure that we have investigated and deliberated on what should be the right policy for our senior citizens who are on such limited incomes.

Chair Ohrenschall:
Are there any questions?

Assemblyman Martin:
The overriding question is, if the program already existed, why not just simply reinstate it? Why go through a study and delay two more years? Seniors will be paying higher real estate taxes for an additional period. I am curious as to the thought process behind this.

Senator Woodhouse:
The reason why we brought it as a study was when we were dealing in 2009 with this issue, the cost of it was quite hefty and, of course, we are not totally out of this recession yet. What we really wanted to do was take a look at this program, to determine if it is the right one going forward and, if so, we will bring it back. In doing a study we can determine if there is a better way.

Senator Justin C. Jones, Clark County Senatorial District No. 9:
During the 2012 campaign, I had many seniors from my district express serious concern that they were living on fixed incomes and struggling to make ends meet. Many of them had to choose between paying for their rent, property taxes, medication, or other life-sustaining necessities. I think that this program is something that we need to look at bringing back. As a supplement to Senator Woodhouse's answer to Assemblyman Martin, that was our original intent. Our understanding had been that they had simply defunded the program, but in fact they had eliminated it. The Legislative Counsel Bureau said it would be very difficult to turn that around and accomplish the goal this legislative session, but we definitely want to make sure that we get it right and bring it back for next legislative session. I would strongly urge the Committee to give full consideration and pass out Senate Bill 298.

Chair Ohrenschall:
Do you know how many seniors participated in the program when it was active and any idea of what it might cost to bring it back?

Senator Woodhouse:
If I can remember all the way back to 2009, I know there were around 18,000 to 20,000 individuals who could apply for the program. I will double-check what the actual number was when the program was in place and what the costs were. When we ran the fiscal note in 2009 it was very large. It was one of the reasons why it was not funded.

Chair Ohrenschall:
Is there anyone else who would like to speak in favor of the measure?

Barry Gold, representing AARP of Nevada:
The prior two speakers said what I usually always say to committees about seniors living on fixed incomes and having to decide whether they are going to buy food, medicine, or electricity. The program was very good and helped a lot of seniors who live on a fixed income. AARP supports property tax relief for seniors if it is done correctly. Therefore, doing a study is a good way to find out what the best method is. Different states have different programs. These programs should be income-based and should be looked at to make sure that they help the maximum number of people who really need it most. AARP, on behalf of our 309,000 members across the state, supports S.B. 298.

Chair Ohrenschall:
Are there any questions? [There were none.]

Marlene Lockard, representing Nevada Women's Lobby:
All of you have such difficult choices to make, and good programs, like this one, have been eliminated. It was very disappointing after the 2011 Session to report to our membership that this program was one of the programs left on the cutting floor out of necessity due to the economic crisis. We very much support the opportunity to see if it is the best approach to help seniors or how the program could be improved.

Chair Ohrenschall:
Are there any questions? [There were none.]

Martin Bibb, Executive Director, Retired Public Employees of Nevada:
The Retired Public Employees of Nevada (RPEN) support Senate Bill 298 for a couple of reasons. With the loss of some of the programs that have been alluded to by previous witnesses, the Legislative Committee on Senior Citizens,

Veterans and Adults with Special Needs was created. This seems to be really appropriate and meaningful work for that type of committee. We think the time is right. This is precisely the kind of assignment that would produce all sorts of information that would be helpful considering this important program for reinstitution.

Chair Ohrenschall:
Do you have any idea how many members of RPEN may have participated in the property tax program?

Martin Bibb:
I do not know that number. Our association has more than 9,500 members in the state and certainly, because many of those folks retired several years ago on extremely limited retirement, some may qualify.

Chair Ohrenschall:
Are there any questions for Mr. Bibb? [There were none.] Is there anyone else in support of the measure? [There was no response.] Is there anyone who is in opposition to the bill who wishes to be heard? [There was no response.] Anyone who is neutral?

Tina Gerber-Winn, Deputy Administrator, Aging and Disability Services Division, Department of Health and Human Services:
We are neutral on this bill, but after hearing you have questions about historical usage of the program and cost, we would gladly contribute that information if it will help you make a decision.

Chair Ohrenschall:
If you have any of that information with you, please go ahead.

Tina Gerber-Winn:
I did not bring it with me. I can say when the program ceased to exist we delivered rebates to about 16,500 individuals across the state. Those rebates ranged in amounts depending on the income that individuals showed. We do have those statistics for the last years of the program and I would be happy to provide that information to you.

Chair Ohrenschall:
That would be wonderful. If you can send them to me I will distribute them to the Committee members. Are there any questions? [There were none.] Senator Woodhouse, are there any closing remarks you would like to make?

Senator Woodhouse:
Thank you for your attention to this matter. We are happy to work with you to move this forward because we really want to find a vehicle to help our senior citizens who are on those fixed incomes.

Chair Ohrenschall:
I will now close the hearing on S.B. 298. I will open it to public comment; I am not seeing anyone. Thank you, members. I will close today's meeting of the Assembly Committee on Legislative Operations and Elections. Meeting adjourned [at 5:52 p.m.].

RESPECTFULLY SUBMITTED:

_____
Karen Pugh
Committee Secretary

APPROVED BY:

_____
Assemblyman James Ohrenschall, Chair

DATE: _____

EXHIBITS

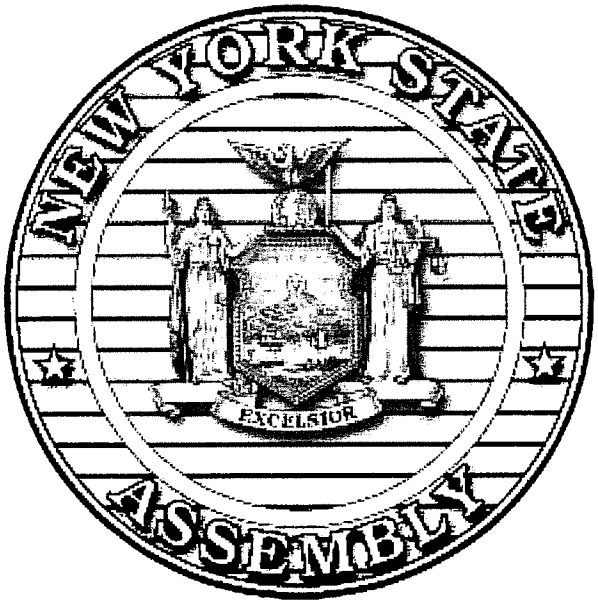
Committee Name: Committee on Legislative Operations and Elections

Date: May 2, 2013 **Time of Meeting: 4:06 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 301	C	Assemblyman James Oscarson	Talking points
A.B. 301	D	Steve Bradhurst, Central Nevada Regional Water Authority	Talking points
A.B. 301	E	Central Nevada Regional Water Authority and Southern Nevada Water Authority	Proposed amendment
A.B. 301	F	Darrell Lacy, General Manager, Nye County Water District	Letter in support
A.B. 444	G	Nancy Hart, President, Nevada Coalition Against the Death Penalty	Financial Facts About the Death Penalty
A.B. 444	H	Nancy Hart	Nevada Death Row Fact Sheet
S.J.R. 5 (R1)	I	Susan Scholley, Committee Policy Analyst	Work session document
S.B. 202	J	Wes Henderson, Executive Director, Nevada League of Cities and Municipalities	Written testimony

EXHIBIT 2

The Death Penalty In New York



A report on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary and Correction, December 15, 2004 - February 11, 2005

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Introduction

On June 24, 2004, in People v. LaValle, the New York Court of Appeals struck down the required "deadlock" instruction provision of New York's 1995 death penalty law, essentially invalidating the operation of the death penalty in New York.[1] The Court left intact, however, provisions of the law that authorized a sentence of life imprisonment without the possibility of parole to be imposed upon any defendant convicted of first degree murder. The Court's actions in LaValle left the legislature with two possible options.

First, we could have acted quickly to:

- restore the death penalty;
- restore the death penalty in a modified form; or
- formally abolish capital punishment in New York, without any formal review of how the law had worked during its nine year history.

We chose a second option. We decided that, rather than act quickly, we would act deliberately. We decided to review New York's death penalty statute in all of its dimensions and solicit the widest range of views possible before considering which action to take, if any.

As the vehicle for that review, we scheduled a series of public hearings on the death penalty by the three standing Assembly committees we chair, all of which have jurisdiction over portions of the various statutes that together comprise New York's death penalty law. This report summarizes the testimony presented at those hearings.

New York's Current Death Penalty Law

New York's current death penalty statute has had a troubled history. In the past ten years, the state and local governments have spent over $170 million administering the law. Yet, not a single person has been executed. Only seven persons have been sentenced to death. Of these, the first four sentences to reach the Court of Appeals were struck down on various grounds. One sentence was converted to a sentence of life imprisonment without the possibility of parole after the LaValle decision. Two sentences are awaiting review.

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[1] People v. LaValle, 3 NY 2d 88 (2004). Under the 1995 death penalty law, jurors in penalty phase proceedings were given two sentencing options: death or life imprisonment without the possibility of parole. Jurors were also told that, in the event the jury was unable to unanimously agree on a sentence, the court would sentence the defendant to a maximum term of life and a minimum term of between 20 and 25 years incarceration. The LaValle court held that the possibility that a defendant could be paroled and released from prison after serving 20-25 years under the "deadlock" sentence created a substantial risk that jurors would be coerced into sentencing a defendant to death to avoid the possibility that the defendant could someday be released from prison if a unanimous verdict was not reached. *See* additional discussion under "A Brief History of the Death Penalty" below.

New York's death penalty deadlock instruction, which is unique in the nation, was first proposed by Governor Pataki in program legislation which was passed by the Senate prior to the final legislative agreement to enact the death penalty in 1995 (*See* S. 2649 [1995]). The Governor's deadlock instruction proposal was later included in the final death penalty law enacted by the legislature on March 7, 1995.

Opponents of capital punishment have continued to strongly oppose the death penalty. But death penalty proponents have been frustrated with the operation of the law as well. Moreover, much has changed in the past ten years. Public attitudes about the death penalty have evolved. The use of capital punishment in this country and throughout the world has changed. A wave of exonerations of sentenced inmates, some through the use of newly analyzed DNA evidence, has raised new concerns about wrongful convictions. In New York, the sentence of life imprisonment without the possibility of parole has become widely applied in first degree murder cases. That sentencing option did not exist in New York prior to 1995.

New York's Death Penalty at a Crossroads

Today we have the opportunity to review whether the death penalty should be enacted not only through the prism of our moral, ethical and legal beliefs, but with the benefit of the real-world experience which the past nine years of practice in New York has given us.

When we originally scheduled two days of public hearings on the death penalty, we expected a significant response. What we received was an outpouring of testimony and evidence about the death penalty that was stunning in its breadth, intelligence and passion. Legal scholars debated whether New York's current statute comported with constitutional due process and fundamental fairness. Religious leaders discussed the morality of capital punishment. Death row inmates who had been exonerated, some after many years of imprisonment, described how that experience had robbed them of years of their lives. Prosecutors testified both for and against the death penalty, described their views on its deterrent effect and outlined their struggles with New York's unique statutory design.

Experts testified about whether there are racial disparities in the administration of capital punishment in New York and around the country. And the family members of murder victims shared their enduring grief and talked about whether the death penalty was the appropriate response to the horrific crimes which had been perpetrated upon their families and loved ones.

After originally scheduling two days of hearings, it was necessary to add three more days to accommodate the large number of persons who asked to testify. The hearings were conducted between December 15, 2004 and February 11, 2005. Everyone who asked to testify at our hearings was invited to do so. A hearing notice[2] included 22 specific questions to which witnesses could direct their testimony. The hearing notice and accompanying publicity made clear that the Committees were seeking testimony from a wide range of sources, representing all views.[3]

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[2] Attached in the appendix to this report.

[3] The formal hearing notice, inviting the submission of testimony, was widely distributed to persons and organizations that might be interested in providing testimony or further publicizing the hearings. Among those who were sent hearing notices were the Governor and the commissioners or directors of all of the State's criminal justice agencies, the State Crime Victims Board, the Lieutenant Governor, Attorney General, Comptroller, New York's two United States Senators and all members of the Assembly, all of the State's elected district attorneys, public defenders, legal aid societies, assigned counsel plans and various law enforcement organizations such as the New York State Association of Chiefs of Police and the New York State Sheriffs' Association. Notice of the hearing was provided on the Assembly's official website, through Assembly press releases and advisories, and through the

146 witnesses testified in person for over 35 hours of oral testimony; written submissions were received by the Committees from 24 additional persons and groups.

The testimony of these 170 hearing witnesses fills more than 1,500 transcribed pages. Written submissions received by the Committees exceed 2,500 pages.

Of the persons who presented oral or written testimony, 148 opposed the death penalty, nine argued in favor of the death penalty, five argued in favor of the death penalty but suggested specific changes in the statute (other than those necessary to address the LaValle decision) and eight did not express an explicit view for or against the death penalty.

The Report on the Hearings

This report is not an exhaustive summary of the hearing transcripts. It is also not a comprehensive research study of the death penalty. It is not intended to present a position for or against the death penalty. Rather, the report is intended to objectively highlight the issues and controversies that were presented and discussed at these extraordinary public hearings.

The Committees invite interested parties considering this important policy question to read the transcripts of these public hearings and the written materials submitted to the Committees, as well as other relevant, published works concerning the death penalty in New York and elsewhere.

We express our gratitude to all of the persons and organizations who presented testimony at our hearings and would also like to thank the many members of our Committees who participated. The following pages present the views of the individuals and organizations who took the time to share with us their thoughts and deeply held beliefs about capital punishment. Hearing these voices has helped us come to important new insights about the death penalty. We hope reviewing the points these witnesses made will be equally illuminating for you.

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"Public Hearing Calendar", which was mailed to all members of the State Senate. Notice of the hearings and the testimony presented was also widely publicized in the print and electronic media during the two months the hearings were conducted.

Executive Summary

On June 24, 2004, the New York Court of Appeals, in People v. LaValle, struck down the required deadlock instruction provision of New York's 1995 death penalty law, essentially invalidating the operation of the death penalty in New York. The Court left intact, however, provisions of New York law which authorize a sentence of life imprisonment without the possibility of parole to be imposed on any defendant convicted of first degree murder.

The Assembly Committees on Codes, Judiciary and Correction subsequently commenced a series of five public hearings to solicit the widest range of views possible on the death penalty in order to determine what action to take, if any, with respect to the statute. The hearings were conducted between December 15, 2004 and February 11, 2005. Every person who asked to testify at the hearings was invited to do so.

The Committees received oral testimony from 146 witnesses and written testimony from 24 witnesses. Of the witnesses who presented oral or written testimony, 148 opposed the death penalty, nine argued in favor of the death penalty, five argued in favor of the death penalty but suggested specific changes in the statute (other than those necessary to address the LaValle decision) and eight did not express an explicit view for or against the death penalty.

This report begins with an introduction which describes why we convened these hearings and how they were conducted. The introduction is followed by this Executive Summary and a brief section which traces the history of the death penalty in New York. The bulk of the report then summarizes the testimony presented at the hearings, grouped by subject area.

The testimony presented at these public hearings was extraordinary in its breadth, intelligence and passion. This report does not present a position for or against the death penalty. Rather, it is intended to objectively highlight the issues and controversies that were presented and discussed at the hearings. Those issues are briefly summarized below and discussed in much greater depth in the body of this report.

Section 1. Retribution, Deterrence and Incapacitation

Arguments for the death penalty generally focus on one of three broad grounds:

- The death penalty is appropriate societal retribution against those who commit certain intentional murders;
- The death penalty deters the commission of crimes subject to capital punishment; or
- The death penalty is necessary to ensure, by incapacitation, that persons who commit capital crimes never do so again.

The Committees received testimony on each of these points.

A. Retribution

A large number of family members of murder victims testified regarding their views about capital punishment. Many of these family members argued against the death penalty. Among those who argued against the death penalty were Carolyn McCarthy, a Long Island Congresswoman whose husband was killed and son seriously wounded in a 1993 attack on the Long Island Railroad; Bruce and Janice Grieshaber, whose daughter Jenna's murder helped lead to the enactment of "Jenna's Law", which, in 1998, barred the parole release of violent felons in New York; and Pat Webdale, whose daughter Kendra was pushed to her death in front of a Manhattan subway train and who subsequently advocated successfully for the enactment of New York's Assisted Outpatient Treatment Law for persons with mental illness, known as "Kendra's Law".

Kate Lowenstein, whose father, former Congressman Allard K. Lowenstein, was shot to death by a mentally ill former student, spoke in opposition to the death penalty arguing that "nothing we do to the killer will bring back our family member from being dead." Carole Lee Brooks, whose son David was murdered at age 28, urged the Committees to "honor my son and other victims of murder by acting with the highest regard of human life."

Several family members testified in favor of the death penalty, based on retributive principles. Debra Jaeger, whose sister Jill was brutally beaten and later murdered in 1998 by her estranged husband, asserted that the death penalty is needed as the ultimate penalty to punish such horrific killings. Joan Truman-Smith passionately told of the painful loss of her daughter, and her support for the execution of certain killers.

Jeff Frayler, on behalf of the New York State Association of Police Benevolent Associations, recalled the murder of NYPD police detectives Patrick Rafferty and Robert Parker in 2004, and said, "as the removal of capital punishment becomes more of a reality, [the killer's] lethal actions will probably guarantee him permanent lodging, clean clothing, food and, more importantly, his life". Professor Robert Blecker of New York Law School argued that the death penalty is appropriate retribution in just proportion to the seriousness of the crimes it punishes.

B. Deterrence

The Committees heard conflicting views and studies about whether the death penalty is an effective deterrent against murder. Professor Robert Blecker cited studies which he asserted indicate that the death penalty is a more effective deterrent than life imprisonment without parole. Sean Byrne from the New York State Prosecutors Training Institute and Michael Palladino of the Detectives Endowment Association argued that the vast decline in murder rates in New York since the enactment of the death penalty provides strong evidence that the death penalty has deterred persons from committing murder.

Professor John Blume of Cornell University testified that the "overwhelming weight of the scholarly research indicates that the death penalty does not deter persons from committing murder." Jeffrey Fagan, a Professor of Law and Health at Columbia University, provided an extensive analysis of death penalty deterrence studies and asserted that there is no reliable

evidence that the death penalty has deterred murder in New York. He asserted that, "Murder is a complex and multiply-determined phenomenon."

C. Incapacitation

Witnesses offered conflicting views about whether the currently available sentence of life imprisonment without the possibility of parole is sufficient to protect society from persons who commit intentional murder. Some witnesses asserted that a sentence of life imprisonment without the possibility of parole provides sufficient protection. Other witnesses argued that life without parole laws could always be changed in the future and therefore did not offer as much protection as the imposition of the death penalty.

Section 2: The Reliability of Capital Convictions

Barry Scheck, Co-Director of the Innocence Project at Cardozo Law School, testified that since 1995, 153 people in the United States convicted of serious crimes, including 14 on death row, have been exonerated by post-conviction DNA testing. Citing one study, he also asserted that since 1989, 329 convicted persons have been exonerated nationwide. Stephen Saloom of the Innocence Project testified that since 1973, 117 persons sentenced to death have had their capital convictions overturned and been released from prison.

A number of persons who were convicted of murder but later exonerated or pardoned and released testified before the Committees. Madison Hobley testified about his 16 years of imprisonment and time on Illinois' death row before being released. John Restivo said that he had been convicted of rape and murder in Nassau County and served 18 years in prison before DNA testing showed that another man had committed the crime.

Richard J. Bartlett, a former Assembly member and Albany Law School Dean, said that erroneous convictions are inevitable and, in a death penalty jurisdiction, sometimes cannot be demonstrated until it is too late. A number of witnesses also suggested statutory changes that could be made to New York's criminal laws which, they said, would reduce the likelihood of wrongful convictions in the future.

Professor Robert Blecker, arguing in favor of the death penalty, acknowledged that an innocent person may have been wrongly executed in recent years. But, he said, no instance of a wrongful execution has ever been proven. Sean Byrne of the New York Prosecutors Training Institute asserted that every defendant convicted under New York's 1995 death penalty statute is "indisputably guilty."

Section 3: Cost of the Death Penalty

A number of witnesses testified about the high cost of the death penalty and asserted that capital punishment is significantly more expensive than life imprisonment without the possibility of parole ("LWOP").

Among the testimony presented at the hearing:

- Richard Dieter of the Death Penalty Information Center said that a North Carolina study concluded that it cost North Carolina $2.6 million more per case for each conviction that resulted in a defendant's execution than for each similar case which did not.

- Mr. Dieter asserted that the cost of an execution in California is nearly $90 million.

- James Liebman, a Columbia Law School professor, predicted that reinstatement of the death penalty would cost New York taxpayers about $500 million over the next twenty years, with two or three executions during that time.

- Jonathan Gradess of the New York State Defenders Association said that New York has spent, based on conservative estimates, $170 million in the past decade on death penalty prosecutions. With seven death sentences imposed, the law has thus cost taxpayers approximately $24 million per death sentence.

Professor Robert Blecker argued, alternatively, that analyses which indicate the death penalty is a more expensive punishment than life imprisonment without parole fail to take into account the savings the death penalty generates because of crimes deterred. He also argued that these analyses fail to consider that guilty defendants in death penalty jurisdictions will often plead guilty, avoiding trial and appellate costs, rather than risk execution.

Sections 4 and 5: Aggravating Factors and Life Without Parole

New York's death penalty law allows prosecutors to seek capital punishment when one of twelve statutory aggravating factors is present. Some witnesses suggested specific ways in which this list of aggravating factors should be expanded. Other witnesses argued the list should be reduced.

Most presenters supported the continued availability of life imprisonment without the possibility of parole as a sentencing option in New York. Several witnesses contended that LWOP is a sufficient penalty for the worst offenders. Some also argued that LWOP is a more severe sanction than execution.

Sections 6: Mental Retardation

A recent U.S. Supreme Court decision bars the execution of persons with mental retardation. New York's death penalty law permits such executions, but only when the defendant was a jail or prison inmate, the victim was an employee of the jail or prison engaged in official duties, and the defendant knew or reasonably should have known that the person was so employed. Witnesses who commented on this question concluded that, in view of the Supreme Court's ruling, a New York defendant found to be mentally retarded under these circumstances could not be executed for this crime, even if the death penalty were reinstated in New York.

Section 7: Mental Illness

Ron Honberg of the National Alliance for the Mentally Ill estimated that 20 percent of persons sentenced to death in the United States have a serious mental illness. Professor John Blume of Cornell University testified that severe mental illness can make a defendant appear to be more dangerous. Mr. Honberg testified that in New York, as in most other states with death penalty laws, mental illness is a statutory mitigating factor which the jury is directed to consider when deciding whether or not to impose the death penalty. However, Mr. Honberg said, there is a growing view among experts that juries inappropriately consider mental illness as an aggravating rather than mitigating factor in capital cases. Mr. Honberg cited studies which he said indicate that capital defendants with serious mental illness are more likely to be sentenced to death than non-mentally ill capital defendants.

Sections 8 and 9: Race and Socio-Economic Issues

Several witnesses asserted that there is evidence of racial discrimination in the use of the death penalty. They contended that in death eligible cases, death sentences are disproportionately imposed on black defendants.

A number of witnesses also presented detailed statistical evidence from New York and other states indicating that murder cases in which the victim was white are significantly more likely to result in death sentences than murder cases in which the victim was black. Among the evidence presented on this point:

- Attorney George Kendall said a 1990 United States General Accounting Office Study evaluating 28 race-and-the-death penalty studies found that, in 82 percent of the studies, the victim's race was a significant factor in determining whether a death sentence was imposed.

- Mr. Kendall cited a later study by Professors Baldus and Woodworth of three-fourths of the states with death sentenced defendants. In this study, he said, Professors Baldus and Woodworth found a similar correlation between victim race and the imposition of the death penalty in 93 percent of these states. In cases in which the victim was white, the defendant was much more likely to be sentenced to death than in cases in which the victim was non-white.

- Professor David Baldus of the University of Iowa found that of the seven defendants sentenced to death in New York, white victim cases outnumbered non-white victim cases by a 2 to 1 margin (62 percent vs. 29 percent).

Professor Robert Blecker argued that to the extent white victim cases were treated as capital crimes more often than black victim crimes, the reason had nothing to do with racism. Rather, he argued, it arises from the fact that prosecutors in suburban counties seek capital punishment more frequently than prosecutors in urban counties. "Capital murders are more frequently of white victims in suburban counties [and] more frequently of minority victims in urban counties," he said. Professor Blecker also maintained that this disparity arises in part from the fact that suburban counties have greater financial resources with which to prosecute capital crimes.

Several witnesses opposed to capital punishment claimed the death penalty is used disproportionately against poor and working-class persons. As a result of economic disadvantage, these witnesses said, these defendants are unable to retain qualified legal counsel and expert testimony. Other witnesses asserted that New York has provided skilled teams of counsel at the trial level and on direct appeal, as well as expert assistance at the trial phase.

Section 10: Prosecutorial Discretion; Geographic Inconsistencies

Prosecutors have broad discretion to designate who among those prosecuted for murder will be exposed to a possible death sentence. Several witnesses expressed concern about this broad discretion, and that it may be exercised in ways that reflect racial or class bias. Other witnesses asserted that New York prosecutors and juries have shown appropriate restraint and have made relatively limited use of the 1995 death penalty law.

A few witnesses expressed concern about geographic inconsistencies in the use of the death penalty. Statistics offered showed that the death sentence has been sought most frequently in Kings, Queens and Monroe counties. To some witnesses, it was illogical that for identical crimes committed under similar circumstances, the prosecutor in one New York county may seek a death sentence, while the prosecutor in an adjoining New York county does not. Other witnesses identified this as an appropriate matter for the exercise of discretion by locally-elected prosecutors.

Sections 12 and 13: Religious-based Views; National and International Use of the Death Penalty

Religious leaders and other persons of faith who offered testimony overwhelmingly opposed capital punishment. One religious organization strongly favored the death penalty.

Thirty-eight states have enacted the death penalty. The death penalty has been essentially halted by court rulings in two states: Kansas and New York. Twelve states and the District of Columbia do not authorize the death penalty. The states with the most executions since 1976 are Texas (340), Virginia (94) and Oklahoma (76). Thirteen people believed to be innocent were

recently released from death row in Illinois; that state currently has a moratorium on the use of the death penalty.

Dr. William Schulz, of Amnesty International USA, said the United States is one of the few industrialized nations that retain the death penalty. Frequently, he said, countries that are moving toward democracy abolish the death penalty. He said that China, Iran, Vietnam and the United States account for 84 percent of judicial executions worldwide. Sean Byrne of the Prosecutors Training Institute noted, however, that the largest democracy in the world (India), the most populated country in the world (China) and the largest country geographically (Russia) all allow capital punishment.

Sections 11, 14 and 15: Trials, Appeals and Post-Conviction Proceedings

Witnesses said that New York's Capital Defender Office and other organizations have helped provide effective defense representation in New York. Some witnesses urged that New York law be amended to ensure that two or more lawyers are appointed for all post-conviction stages, through consideration of executive clemency and up to execution.

A few witnesses urged that discovery laws be changed to ensure greater disclosure and earlier access by the defense to evidence and witness statements, in advance of capital trials. Several witnesses opposed current laws that allow prosecutors to strike jurors who are firmly opposed to capital punishment from both the guilt/innocence and sentencing phases of capital trials.

Professor William Bowers of the Capital Jury Project at Northeastern University submitted a study he authored with Professor Wanda Foglia concerning the sentencing behavior of capital juries. Based on his study, Bowers asserted that capital juries make premature sentencing decisions at the guilt phase of capital trials (before penalty phase evidence is presented), incorrectly believe they must impose a death sentence if certain aggravating factors are present and wrongly believe they are not responsible for the ultimate sentencing decision.

Schenectady County District Attorney Robert Carney expressed concern that appellate courts have used strained legal reasoning to reverse death sentences. This, he said, has the potential to negatively impact appellate precedent and the fair adjudication of non-capital cases. He supports capital punishment, but for pragmatic reasons, urged the Legislature not to restore it in New York.

Sections 16 and 17: Death Row and the Execution Process

New York's death row is located at the Clinton Correctional Facility. Two witnesses testified about what they said were unduly severe conditions at the facility. Several witnesses, including David Kaczynski, the brother of convicted "Unabomber" Ted Kaczynski and Robert Meeropol, the son of Julius and Ethel Rosenberg, who were executed for conspiracy to commit espionage in 1953, testified about the impact which execution or the potential for execution has on the close family members of persons subject to the death penalty.

Mr. Byrne of the Prosecutors Training Institute countered that conditions on New York's death row are neither substandard nor inappropriate and that death row inmates in New York live in a "humane environment" accredited by the American Correctional Association.

Section 18: Proposed Legislative Amendments to the Death Penalty Law

Sean Byrne of the New York Prosecutors Training Institute supports legislation to immediately address the Court of Appeals ruling in LaValle and restore the death penalty.

The State Senate has passed a Governor's Program Bill designed to address the LaValle ruling. The bill would require that capital case penalty phase jurors deliberate on three options: a death sentence, LWOP or a life sentence with parole consideration after between 20 to 25 years of imprisonment. Under the bill, if the jurors failed to reach unanimous agreement on one of these sentencing options, the judge would sentence the defendant to LWOP. The jury would be told, prior to penalty-phase deliberations, that in the event of a deadlock, the sentence would be LWOP.

The Governor's Program Bill would apply these same rules retroactively to crimes committed before enactment of the new law. As a result, the deadlock sentence for past crimes would be elevated from 20-25 years to life, to LWOP. Sean Byrne and Professor Blecker asserted that this change would not violate the *ex post facto* clause of the United States Constitution. Other witnesses asserted that the Governor's program bill would be vulnerable to a constitutional challenge on *ex post facto* or other grounds.

A Brief History of the Death Penalty in New York

The existence of the death penalty in New York dates to the Colonial period.[4] During that time, many crimes were punishable by death. In the late 1700's and early 1800's, the number of crimes for which a defendant was eligible for the death penalty was reduced to murder, treason and arson of an occupied dwelling.[5] In the mid-1800's, murder was divided into two categories or degrees, with only the first-degree crime punishable by the death penalty.

A 1937 amendment made the death penalty mandatory for first degree murder, unless the jury recommended life imprisonment.[6] Legislation enacted in 1963 reversed the sentencing language so that murder in the first degree was punishable by life imprisonment, unless the jury recommended a death sentence.[7] In addition, under the 1963 revision, if the defendant was under eighteen at the time the crime was committed or if the sentence of death was not warranted because of substantial mitigating circumstances, the court was required to discharge the jury and sentence the defendant to life imprisonment.[8] Also of procedural importance, the amended 1963 law bifurcated the fact-finding and sentencing phases of trial to require a separate proceeding to determine whether the defendant should be sentenced to life imprisonment or to death (assuming the court had not already sentenced the defendant to life imprisonment as a matter of law).[9]

In 1965, legislation was enacted to limit the death penalty to murder in the first degree when the victim was a peace officer[10] performing his or her official duties, when the defendant was serving a life sentence at the time the crime was committed, if the crime was committed when the defendant was serving an indeterminate sentence of at least fifteen years to life, or if the defendant was in immediate flight from penal custody or confinement when the crime was committed.[11] The 1965 law expressly prohibited the death penalty for persons under the age of eighteen when the crime was committed and also did not impose the death penalty when substantial mitigating circumstances existed.[12]

In 1967, the death penalty law was amended to include intentional murder, depraved indifference to human life murder and felony murder, and made a defendant convicted of such crimes eligible for the death penalty if either: (A) the victim was a peace officer killed while performing his official duties, or (B) the defendant was confined to a state prison for a term of life or an indeterminate term of at least fifteen years, or in immediate flight after escape from such custody when the crime was committed. The death penalty was only available in such cases if the defendant was more than eighteen years old at the time of the commission of the

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[4] STATE OF N.Y. TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, SPECIAL REPORT ON CAPITAL PUNISHMENT, March 19, 1965, at 81 (hereinafter referred to as the "1965 report").

[5] Donnino, PRACTICE COMMENTARIES, N.Y. PENAL LAW § 125.27, McKinney's Consolidated Laws of New York (1998) at 381-82 (quoting 1965 Report).

[6] N.Y. Sess. Laws 1937, ch. 67.

[7] N.Y. Sess. Laws 1963, ch. 994.

[8] Id.

[9] Id.

[10] The statutory definition of a "peace officer" under New York law has been significantly modified since the 1960's.

[11] N.Y. Sess. Laws 1965, ch. 321.

[12] Id.

crime and there were no substantial mitigating circumstances that rendered a sentence of death unwarranted.[13] In 1968, the act of recklessly engaging in conduct evincing a depraved indifference to human life that results in the killing of another was removed from the list of death eligible crimes.[14] And, in 1971, the legislature added the killing of an employee of a local jail, penitentiary or correctional institution performing his official duties to the list of crimes eligible for the death penalty.[15]

In 1972, the United States Supreme Court in Furman v. Georgia[16] invalidated Georgia's death penalty law. In a one-page *per curiam* opinion, followed by several concurrences, the court held that the imposition of the death penalty in the three cases before it constituted cruel and unusual punishment in violation of the Constitution. In concurring opinions, Justices Brennan and Marshall argued that the death penalty was unconstitutional in all instances; other concurrences focused on the arbitrary nature with which death sentences had been imposed and some concurrences found that the death penalty had been imposed with unlawful racial bias against black defendants.[17]

In response to Furman, states enacted revised legislation tailored to satisfy constitutional concerns regarding the arbitrary imposition of capital punishment. These laws were of two major types. The first type provided for a mandatory death penalty for specified crimes and allowed for no judicial or jury discretion beyond the determination of guilt. Statutes of this kind were declared unconstitutional by the Supreme Court in Woodson v. North Carolina[18] and Roberts v. Louisiana.[19]

The second type provided for "guided discretion" in sentencing, and statutes of this nature were upheld by the Supreme Court in three related cases: Gregg v. Georgia;[20] Jurek v. Texas;[21] and Proffitt v. Florida.[22] The Georgia, Texas, and Florida statutes validated by the Supreme Court allowed the sentencing court discretion in imposing death sentences for specified crimes and provided for bifurcated trial phases, where the first stage would determine the defendant's guilt or innocence and the second stage would determine the defendant's sentence, after considering aggravating and mitigating factors. In 1978, the Supreme Court further articulated the constitutional requirements of sentencing by stating that a sentencing authority in a capital case must consider every possible mitigating factor to the crime.[23]

Because the Furman decision declared unconstitutional various death penalty statutes, but not the punishment itself, on "cruel and unusual" punishment grounds, an effort was made in

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[13] N.Y. Sess. Laws 1967, ch. 791.
[14] N.Y. Sess. Laws 1968, ch. 949.
[15] N.Y. Sess. Laws 1971, ch. 1205.
[16] Furman v. Georgia, 408 U.S. 238 (1972).
[17] Id.
[18] Woodson v. North Carolina, 428 U.S. 280 (1976).
[19] Roberts v. Louisiana, 428 U.S. 325 (1976).
[20] Gregg v. Georgia, 428 U.S. 153 (1976).
[21] Jurek v. Texas, 428 U.S. 262 (1976).
[22] Proffitt v. Florida, 428 U.S. 242 (1976).
[23] Lockett v. Ohio, 438 U.S. 586 (1978).

New York, as in many other states, to enact a new death penalty statute that would comply with Furman and the Supreme Court's later death penalty holdings.

Beginning in 1975, legislation to restore capital punishment was passed over a period of twenty years by the legislature, but vetoed by Governors Carey (1975-82) and Cuomo (1983-94). None of the vetoes were overridden by the legislature. In 1995, the legislature passed a newly revised and expanded death penalty statute which was signed into law by Governor Pataki.[24] As amended through 2004, the law authorized the death penalty for thirteen categories of intentional murder, including murders committed in furtherance of other crimes like robbery, rape or burglary.

The 1995 Death Penalty Law

Since New York's most recent death penalty law was enacted on September 1, 1995, as noted earlier, seven persons have been sentenced to death in New York. The sentences of Darrell Harris, Angel Mateo and James Cahill were reversed after separate appeals to the New York Court of Appeals.[25] Appeals by two death row inmates, John Taylor and Robert Shulman, are now pending before the New York Court of Appeals.

On June 24, 2004, the Court of Appeals declared New York's death penalty statute unconstitutional in People v. LaValle.[26] Stephen LaValle had been convicted of the brutal rape, stabbing and murder of Cynthia Quinn in the village of Yaphank, in Suffolk County. Following the Court's holding in LaValle, the defendant was sentenced to a term of life imprisonment without the possibility of parole.

The constitutional flaw identified by the Court in LaValle arises in the penalty phase of a capital trial. Under New York law, if the jury is unable to unanimously decide between the two sentencing options presented, death or life imprisonment without parole, then the jury must be told that the judge will sentence the defendant to a third, less severe sentence that the jury may not select: life imprisonment with a possibility of parole after between twenty and twenty-five years of imprisonment. [27]

By a 5-4 vote, the Court of Appeals in LaValle found that this "deadlock" instruction violated due process under the New York State Constitution.[28] The court ruled that the instruction created an unacceptable risk that jurors favoring life without parole would be induced to vote for execution, out of concern that the failure to reach unanimous agreement would result in a third, unacceptable outcome: life with a possibility of the defendant's release on parole after twenty or twenty-five years.

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[24] N.Y. Sess. Laws 1995, ch. 1.

[25] *See* People v. Harris, 98 N.Y.2d 452 (2002); People v. Mateo, 2 N.Y.3d 383 (2004); People v. Cahill, 2 N.Y.3d 14 (2003).

[26] People v. LaValle, 3 N.Y.3d 88 (2004).

[27] N.Y. CRIM. PROC. LAW 400.27(10).

[28] *See* LaValle *supra* at 128.

Additionally, the court ruled that it could not cure the statute by forbidding or eliminating this instruction because, in a capital case, as a matter of state constitutional due process, a penalty phase jury must be instructed as to the consequences of a deadlock. An instruction is required, the court ruled, because a failure to instruct under these circumstances could lead to inappropriate speculation by the jury that, absent unanimous agreement, the defendant could be released, and possibly endanger the community.[29]

ISSUES PRESENTED AT THE PUBLIC HEARINGS

1. Traditional Rationales for the Death Penalty: Retribution, Deterrence and Incapacitation

Arguments in favor of the death penalty generally focus on one of three broad grounds:

- The death penalty is an appropriate exercise of societal retribution against those who commit certain intentional murders;
- The death penalty deters the commission of crimes subject to capital punishment; or,
- The death penalty is necessary to ensure, through incapacitation, that persons who commit such crimes will never do so again.

During the public hearings, the Committees received testimony on each of these points.

A. Retribution

Professor Robert Blecker of New York Law School argued in favor of the death penalty based on retributive principles. Retribution, Professor Blecker testified, means just punishment in the form of pain and suffering proportional to the seriousness of the crime. Proportional application of the death penalty must address the seriousness of the crime and the moral character of the defendant. The nature of murder and the victim's suffering invoke a profound emotional response from society, he said, that justifies society's application of the death penalty as retribution.

"Do not confuse retribution with revenge," Professor Blecker said. "Revenge can be limitless and misdirected or collectively applied to many who don't deserve it; retribution is limited, proportionate and directed only at the morally culpable actor."

Many witnesses appearing before the Committees expressed understanding and sympathy for retributive thoughts among survivors of murder victims, but argued that, in the end, execution of the killer does not take away the pain family members experience. Bud Welch, who lost a

[29] Id; It should be noted that in one of the two cases now on appeal to the Court of Appeals, People v. Taylor, the prosecution argues that the specific instruction given by the trial court to the jury in that case avoided any coercive effect and therefore should result in the defendant's death sentence being upheld, notwithstanding the LaValle holding.

daughter in the 1995 Oklahoma City bombing, opposes the death penalty, in part because it provides no closure to family members of crime victims. In fact, Mr. Welch testified, the death penalty causes more pain and loss because it results in an additional killing.

The Committees heard similar sentiments expressed by Patricia Perry, who lost her police officer son, John William Perry, in the September 11, 2001 World Trade Center attack. S. Jean Smith and Sister Camille D'Arienzo also opposed the death penalty on these grounds.

A report from the League of Women Voters stated that when a family member is lost to murder, the healing process for some in the family includes recognition that executing the killer will not bring the loved one back. For some survivors, the report said, the death penalty brings closure while for others, it prolongs grief.

Kate Lowenstein and Bill Pelke who lost, respectively, a father and grandmother to murder, told Committee members that government efforts and resources used to exact vengeance against murderers should instead be used to help the people who live in the aftermath of these tragedies.

Kate Lowenstein's father was Allard K. Lowenstein, a former United States Representative from New York's Fifth Congressional district. Congressman Lowenstein was shot to death in his office by a mentally ill former student. Ms. Lowenstein spoke of the range of emotions she experienced after this devastating loss:

> We have all been filled with a consuming anger and horror and fury at the killer. We want the murderer caught and punished. I know the rage and sense of justice that lead people to support the death penalty. I also know, from working with murder victim family members for the past four years, that what victim's families need is help to heal and learn how to live with a mangled heart. They need support and counseling. We need the killer to be caught and brought to justice. We do not need an execution.
>
> ...Those of us who have gone through it are forced to realize, maybe slowly, but inevitably that nothing we do to the killer will bring back our family member from being dead. The state offers victims the death penalty as if it is some kind of scale they can use to correct the loss, but you can't, and in the process of trying, we buy into a system that we all know by now, does no honor to the victims or to our society.

In a statement, Carolyn McCarthy, the U.S. Representative for the Fourth Congressional District in Nassau County, expressed opposition to the death penalty. Representative McCarthy's husband was murdered on a Long Island Railroad train in 1993; her son was seriously wounded in the same attack.

Carole Lee Brooks, whose son David was murdered at age 28, also testified against the death penalty. Ms. Brooks appeared as a representative of "Parents of Murdered Children," and noted that there is a national organization, "Murder Victim [Families] for Reconciliation." She

urged the Committees to "honor my son and other victims of murder by acting with the highest regard of human life."

Janice and Bruce Grieshaber lost their daughter Jenna to murder several years ago. In 1998, their efforts in the State Legislature helped lead to the enactment of "Jenna's Law", which eliminated parole release for first time violent felons. The Grieshabers support life imprisonment without the possibility of parole, but oppose capital punishment.

Pat Webdale, whose daughter Kendra was pushed to her death in front of a Manhattan subway train, testified against capital punishment. Ms. Webdale's advocacy led to the enactment of New York's Assisted Outpatient Treatment law for persons with mental illness, known as "Kendra's Law".

Marguerite Marsh's daughter Cathy, was murdered more than seven years ago. She died before her thirtieth birthday. The perpetrator of this crime was sentenced to life imprisonment without the possibility of parole under the 1995 New York law. Ms. Marsh is "satisfied" with the sentence. Ms. Marsh said she is "grateful that I will not have to bear the pain of going through appeal after appeal, and Cathy's two little daughters will not have to grow up subjected to accounts of their mother's murder over and over again in the newspapers and on TV."

Other victims' survivors told Committee members that the death penalty is necessary because otherwise the killer – unlike their family members – can continue to breathe and experience life.

Joan Truman-Smith, whose daughter was murdered in the 2000 "Wendy's Massacre" in Queens, New York, told Committee members that nothing short of the death penalty is needed to ensure that justice is served:

> Until it's at your door, you are [not] going to feel the same thing I am saying . . . Think of the crime these people committed and if the evidence fit[s] ... kill them.

Debra Jaeger, whose sister Jill Cahill was murdered by her estranged husband in 1998, testified for herself and her brother David. Debra Jaeger told Committee members she believes the death penalty is needed as the ultimate penalty to punish such horrific crimes.

Sean Byrne of the NY Prosecutors Training Institute argued that the death penalty is appropriate retribution for the most violent crimes. Jeff Frayler, on behalf of the NYS Association of Police Benevolent Associations, agreed:

> Just look at the faces of [three children], who, on September 10, 2004 had their lives forever altered when their father, Detective Patrick Rafferty, along with his patrol partner, Detective Robert Parker, was senselessly gunned down on a Brooklyn Street by Marlon Legere, who had previously served time on three separate occasions for other criminal activities. Legere, who was no stranger to the criminal justice system, committed these ruthless murders while two of New York's finest were faithfully carrying out their public duties.

Unfortunately, as the removal of capital punishment becomes more of a reality, his lethal actions will probably guarantee him permanent lodging, clean clothing, food and, more importantly, his life.

Richard Harcrow of the New York State Correctional Officers and Police Benevolent Association asked, "Why should the felon who kills a dedicated law enforcement professional be comforted into thinking that they will not suffer the ultimate penalty for this crime?" Mr. Harcrow believes capital punishment is necessary so that, when a law enforcement official is killed in the course of his or her sworn duties, surviving family members will know that the death of their loved one "was not in vain."

A few death penalty opponents warned that calls for retribution can turn to vengeance and a frenzy misdirected against innocent persons. Lawyer Myron Beldock represented Yusef Salaam who, along with hearing witness Karey Wise, was convicted but later freed in the rape and brutal beating of the "Central Park Jogger." Beldock told Committee members that in some instances, the "court" of public opinion condemns suspects even before any prosecution begins.

Former New York City Public Advocate Mark Green expressed similar concerns about pretrial publicity. And to those who support the death penalty based on retributivist principles, Green asked rhetorically, "If someone tortured a victim, should the state then comparably torture the defendant?"

B. Deterrence

Testimony received by the Committees indicates that there are conflicting views and studies on whether or not the death penalty is an effective deterrent against murder. Some witnesses also addressed the question of whether, if the death penalty does deter, it deters more effectively than life imprisonment without the possibility of parole.

New York County District Attorney Robert Morgenthau noted that for punishment to serve as an effective deterrent, it must be "prompt and certain." The death penalty, he said, "is neither". District Attorney Morgenthau urged the Legislature not to reinstate capital punishment.

Professor John Blume of Cornell University Law School testified that the "overwhelming weight of the scholarly research indicates that the death penalty does not deter persons from committing murder." He also noted that:

- Cornell University research indicates that states which have abolished capital punishment "by and large have lower murder rates than states that retain capital punishment";

- The deadliest and most notorious serial killers, such as Ted Bundy, Donald Gaskins, John Gacey and Ailleen Wornos, committed their crimes in states with active death penalties. "The threat of capital punishment, in short, was no deterrent to them"; and

- Professor Blume's study of death row "volunteers" revealed that some individuals committed their crimes "for the purpose of being apprehended and sentenced to death." Essentially, Professor Blume said, these persons committed their crimes in a death penalty jurisdiction "as a form of suicide."

Professor Sam Donnelly of Syracuse University Law School noted that an increased police presence and new programs prosecuting gang members under organized crime laws have reduced murder rates in some upstate cities. Crime rates have been dropping in New York City since the early 1990s, and Professor Donnelly attributes this to community policing and improved crime control measures. He testified that, "Capital punishment is a distraction from the measures that can most effectively control murder and other crimes."

Raymond A. Kelly, Jr. of the New York State Association of Criminal Defense Lawyers is an experienced criminal defense attorney. He is convinced, based on his experience representing many persons charged with homicide, that the death penalty is not a deterrent. Most murders, he argued, result from non-premeditated events that develop from competition between criminals over turf.

Most of the accused killers he has represented, Mr. Kelly said, did not believe they would be caught, and so would not have been deterred by harsher penalties. Once arrested, Mr. Kelly testified, many defendants he has represented would prefer a death sentence to life imprisonment without parole.

In separate testimony, Russell Neufeld agreed, based on twenty-five years representing criminal defendants, that in the overwhelming majority of homicide cases the killing was an unplanned, irrational act. These killings, he said, would not have been deterred if a death penalty were in place.

Sean Byrne of the New York Prosecutors Training Institute called the debate over whether the death penalty deters "diversionary and over emphasized." "Nonetheless," he noted several studies that, he said, "prove that capital punishment has a deterrent effect." Mr. Byrne acknowledged that there are studies that reached the opposite view, but cited one study that, he said, shows that the death penalty "deters as many as 14 homicides for each person executed."

Murders in New York declined, Mr. Byrne said, from 1,980 in 1994 to 923 in 2003, rates not seen since the 1960's.[30] "To turn the prove-a-negative deterrence argument around," he said, "death penalty opponents cannot prove that the re-enactment of the death penalty did not contribute to the rapid decline in murders in New York."

Similarly, Professor Robert Blecker of New York Law School believes the death penalty deters some murders. In his written testimony, Professor Blecker cited several published articles which, he said, indicate the death penalty deters "most effectively." "Those studies," he said, "have their critics among the abolitionists – but on balance, the informed best guess is that a real death penalty operates as a marginally more effective deterrent than [life without parole]."

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[30] The rate spiked higher in 2001 due to the World Trade Center attack on September 11.

Professor Blecker told the Committees that he has interviewed hundreds of prisoners over thousands of hours. On one occasion, he said, he learned that persons living near the nation's capital sometimes killed in Washington D.C., but not in Maryland or Virginia, because they were aware that Washington D.C., unlike Maryland or Virginia, did not have capital punishment.

Professor Jeffrey Fagan, a Professor of Law and Health at Columbia University has studied capital punishment in the U.S. and homicide rates in American cities "over the past three decades." New studies claiming that executions reduce murders, Professor Fagan wrote to the Committees, "are fraught with technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive up murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence". He added:

> [C]areful analysis of the experience in New York State compared to others, lead[s] to a rejection of the idea that either death sentences or executions deter murder.

According to Professor Fagan, a published 1975 study by Professor Isaac Ehrlich claimed that executions in the 1950's and 1960's prevented approximately eight murders. Professor Ehrlich's study, Professor Fagan said, was noted in Gregg v. Georgia and is cited frequently by death penalty proponents. However, Professor Fagan claimed Professor Ehrlich's findings were disputed by articles published, for example, in the Yale Law Journal and by an expert panel appointed by the National Academy of Sciences. There have been several attempts to replicate Professor Erhlich's study without success, Professor Fagan said.

Since 1995, Professor Fagan testified, there have been approximately a dozen studies that claim the death penalty acts as a deterrent. Professor Fagan said there are serious scientific flaws in these studies. According to Professor Fagan, all but one of these studies groups all types of murder in the same category. The claim is that regardless of motivation, the threat of the death penalty would be an equally effective deterrent. This logic, Professor Fagan said, fails when dealing with crimes of passion or jealousy.

According to Professor Fagan, many of the studies produce contradictory results. One study, he said, found that in some states it appears executions are as likely to produce an increase in homicides following an execution, as they are to produce a reduction in homicides. In addition, some states show an increase in homicides, or a "brutalization" effect, following an execution but at other times, a correlation to a deterrent effect is seen.

Professor Fagan asserted that there is no direct test of deterrence in any of these studies. The studies, Professor Fagan said, do not show that defendants are aware of the status of the death penalty in the state in which they are accused of committing the crime. The studies also do not show that defendants rationally decide to forego homicide and use less lethal forms of violence.

Professor Fagan said the research performed by Professor Berk shows that the proven deterrent effect of executions, if any, are confined to the state of Texas. This, he said, is shown

only during years in which there were more than five executions per year. Most states never reach these levels of executions per year. According to Professor Fagan, Professor Berk's research shows that when Texas is excluded, there is no evidence of a deterrent relationship between executions and homicides.

Professor Fagan asserted that recent deterrence studies fail to account for whether any of the presumed deterrent effect of the death penalty may be due to the much more frequently imposed sentence of life imprisonment without parole applicable in the jurisdictions studied. Professor Fagan said:

> Murder is a complex and multiply-determined phenomenon . . . . [T]here is no reliable, scientifically sound evidence that execution can exert an effect that either acts separately and sufficiently powerfully to overwhelm . . . these patterns.

Michael Palladino of the Detectives Endowment Association argued that the death penalty deters crime, even though it is difficult to prove that proposition by statistical methods:

> From my experience, I believe capital punishment is most definitely a deterrent. The problem is the difficulty in tracking or accurately measuring that statistic. However, what can be tracked is the crime and murder statistics when the death penalty is in favor. When capital punishment is law, the murder rate is lower.

Mr. Palladino described a surge of crime and murder in New York City beginning in the 1970s, through the 1980s and into the 1990s. He contends that with enactment of the death penalty, "the crime and murder rates began to quickly and steadily decline to rates not seen since the "good old days of the 60s." "The common denominator," he said, "linking those two lowest crime periods is capital punishment as a deterrent."

C. Incapacitation

Incapacitation is also a frequently-cited basis for the application the death penalty. Death penalty supporters argued to the Committees that capital punishment protects potential victims against future violence because, for example, there may not be perfect certainty that a sentence of life imprisonment without parole will be upheld for the duration of the prisoner's life. The death penalty, these supporters asserted, incapacitates the most egregious offenders and effectively removes the potential for them to harm anyone again.

Professor Blecker also advanced the view of some capital punishment supporters that prisons provide particularly insidious offenders with the further opportunity to murder innocent people.

Opponents of capital punishment argued to the Committees that persons sentenced to life imprisonment without parole are denied the opportunity to return to society, and so life without the possibility of parole ("LWOP") is sufficient protection for the public. Citing a recent study

by her organization, Kathryn Kase of the Texas Defender Service argued that predictions about who among convicted persons will be dangerous in the future are often wildly imprecise.[31]

Others argued there is no solid assurance that a life-without-parole sentence will never be changed or modified. Monroe County District Attorney Michael Green noted the case of a Monroe County man sentenced for rape and murder in the early 1960's. The man pled guilty to avoid the death penalty and was, D.A. Green claimed, sentenced to LWOP but, D.A. Green said, the law was later changed to allow for the possibility of parole. Recently, forty-two years after this crime, 8,000 people responded to a petition drive, and urged the Division of Parole to continue to deny this offender parole release.

2. Reliability of Capital Convictions

The Committees heard testimony from several witnesses concerning the reliability of capital trials. Barry Scheck, Co-Director of the Innocence Project at Cardozo Law School, said that since 1995, 153 people in the United States, including fourteen men under sentence of death, have been exonerated by post-conviction DNA testing. However, Mr. Scheck contended, there is evidence available for possible DNA testing (and potential exoneration of the defendant) in only 20 percent of all serious felony prosecutions.

Citing a University of Michigan study,[32] Mr. Scheck testified that since 1989, there have been more than 329 post-conviction exonerations nationwide. Most were based on new information, not DNA evidence. Death row inmates, Mr. Scheck said, account for one half of one percent of America's prison population, yet 22 percent of all post-conviction exonerations.

Professor Sam Gross of the University of Michigan Law School advised the Committees that since 1989, 205 persons convicted of murder have been exonerated nationwide. Of these, he wrote, 74 persons sentenced to death had their capital convictions overturned and were released from prison. Attorney Stephen Saloom of the Innocence Project, and others, testified that 117 people have been released from death row and, they said, exonerated since 1973.

Mr. Scheck argued that unfavorable publicity and strong community sentiments promote a rush to judgment in cases involving violent crimes, sometimes leading to erroneous convictions. Over the course of modern history, Mr. Scheck said, scores of New Yorkers each decade have been found to have been wrongly convicted; many of these persons, Mr. Scheck said, would have faced the death penalty, had it been in effect in New York prior to 1995.

Mr. Scheck offered several proposals he said would help reduce instances of wrongful conviction and which should be enacted before lawmakers consider re-instituting the death penalty. Among the proposals:

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[31] *See* TEXAS DEFENDER SERVICE, Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness, (2004).

[32] Samuel Gross et al., Exonerations in the United States, 1989 through 2003, 95 J. CRIM. L. & CRIMINOLOGY 2005 (on file with the Committees).

- Establish new procedures to decrease mistaken eyewitness identifications, while preserving the number of correct identifications;

- Reduce instances of false confessions by videotaping interrogations;

- Increase funding to improve the accuracy of forensic tests conducted by crime laboratories; and

- Adopt measures designed to assure fair investigations and trials.[33]

Scott Christianson, a former Deputy Commissioner of the NYS Division of Criminal Justice Services, authored two books: Inside the Sing Sing Death House (2000) and Innocent: Inside Wrongful Conviction Cases (2003). Mr. Christianson noted that New York executed 614 persons from 1891 to 1963. Several studies, he said, have ranked New York high on the list of states with large numbers of wrongful convictions, including capital convictions. Mr. Christianson made several recommendations:

- State agencies, including the Court of Claims, should maintain records and annually report on wrongful convictions;

- A blue-ribbon panel should be appointed to review and address the problem;

- Police should use sequential line-ups and special record-keeping procedures; and

- Prosecutors should not be immune from civil liability.

The NYS League of Women Voters recently conducted a study of the death penalty. The League noted that poor quality investigations have led to many wrongful convictions. Marsha Weissman of the Center for Community Alternatives asserted that inevitable human error leads inexorably to the execution of innocent persons.

In written testimony, Professor Sam Gross of the University of Michigan Law School contended there has been a rapid increase in reported exonerations in the past fifteen years. According to Professor Gross, this likely reflects the combined effects of three trends:

> First, the growing availability and sophistication of DNA identification technology has, of course, produced an increase in DNA exonerations over time. Second, the singular importance of the DNA revolution has made exonerations increasingly newsworthy; as a result, we are probably aware of a higher proportion of the exonerations that occurred in 2003 than in 1989. And third, this increase in attention has in turn led to a substantial increase in the number of false

[33] In testimony before the Committees, Professor Evan Mandery of John Jay College of Criminal Justice, Bettina Plevan of the Association of the Bar of the City of New York and attorneys Russell Neufeld and Colleen Brady also recommended several of these reforms.

convictions that in fact do come to light and end in exonerations, by DNA or other means.[34]

According to Professor Gross, the average time between conviction and exoneration for those identified in this study was more than eleven years.

New York County District Attorney Robert Morgenthau testified that post-conviction exonerations often result from dogged efforts by public officials determined to ensure that a conviction was not obtained in error. District Attorney Morgenthau cited cases his office prosecuted in which the defendant was ultimately exonerated, years later. Regarding one case, he said, "[T]his exoneration came after the defendant had already served a substantial portion of his sentence but if this had been a capital case, it may well have come too late to do the defendant any good at all."

Others offered testimony that exonerations come as frequently by happenstance, or without the cooperation of local officials. Thomas P. Sullivan, a member of the so-called "Ryan Commission" established by Illinois Governor George Ryan to investigate wrongful convictions under Illinois law, told the Committees thirteen persons were freed from Illinois' death row before Governor Ryan appointed a commission to study the problem. In several cases, evidence that exonerated the defendant was uncovered not by lawyers or police officers, but by journalism students in an investigative clinic at Northwestern University.

Bishop Jack McKelvey of the Episcopal Diocese of Rochester also noted the extraordinary circumstance of journalism students uncovering evidence that exonerated condemned persons.

Professor William Hellerstein of Brooklyn Law School has represented several persons who were convicted of murder in New York, but later freed. Professor Hellerstein represented Eric Jackson, who was convicted in 1981 of causing the death of six firefighters in a Brooklyn supermarket fire. As a result of discovery information obtained as part of a civil lawsuit brought by the firefighters' widows, Jackson was able to offer proof that the fire was not arson, and that he had been wrongly convicted. After several years of litigation, Jackson's conviction was vacated and he was freed from prison.

Professor Hellerstein represented Nathaniel Carter, who was convicted in 1982 of murdering his mother-in-law. Professor Hellerstein testified that he was later able to uncover evidence that Carter's ex-wife framed Carter for the murder. Professor Hellerstein's motion to vacate Carter's conviction was ultimately granted and Carter was freed.

Professor Hellerstein recently represented David Wong, who was convicted of murder in the 1986 stabbing death of a fellow inmate at New York's Clinton Correctional Facility. Professor Hellerstein said students working with him at Brooklyn Law School uncovered evidence that another inmate, not Wong, committed the murder. On December 20, 2004, Professor Hellerstein testified, Acting Clinton County Judge Richard Giardino dismissed the

[34] See Gross *supra* 32.

indictment against Wong, ruling, according to Professor Hellerstein, that "the defense contends and, while not stating so specifically, the prosecution essentially admits that a trial at this juncture would likely result in an acquittal."

Richard J. Bartlett, a former member of the N.Y.S. Assembly, a former chair of the New York State Penal Law Revision Commission and a former Dean of Albany Law School, testified before the Committees. Dean Bartlett is convinced that erroneous convictions are inevitable and these errors, he said, sometimes cannot be demonstrated until it is too late.

Stephen Dalsheim retired as Superintendent of New York's Sing Sing prison after forty-two years with the Department of Correctional Services. Superintendent Dalshiem testified that during his twenty year tenure as warden, he met numerous governmental officials who were convicted of crimes related to their work:

> This included a few commissioners, a few judges and quite a few police officers and detectives. Some of these men spoke quite freely to me, quite openly and they admitted placing false evidence and making false statements in order to get convictions. Believing strongly in their cases, they committed perjury in order to get convictions. Some said you have to be creative, especially when dealing with liberal judges. You have to build a solid case. Some said it was a common practice.
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> Now I don't know how common it is but I know there were innocent people in prison and I met a few of them . . .

The Committees heard testimony from several individuals who were convicted of murder or other serious felony charges, but later freed. Madison Hobley, a former Illinois death row inmate, testified before the Committees. Mr. Hobley was convicted of starting a fire that killed his wife, his infant son and five other persons. Mr. Hobley testified that there was no physical evidence linking him to the crime. Mr. Hobley was freed from prison after sixteen years.[35]

Ernest Shujaa Graham was freed from California's death row after serving 15 years in prison. His first trial ended in a hung jury. He told the Committees that his conviction in the second trial was overturned, after it was shown that prosecutors had systematically excluded African-American jurors from the jury panel. A third trial resulted in a hung jury; he was acquitted after a fourth trial.[36]

Robert McLaughlin and his father, Harold Hohne, also testified. Mr. McLaughlin served six and one-half years in a New York State prison before he was freed, after persistent efforts by his father and several volunteer attorneys. Mr. Hohne and Mr. McLaughlin explained that Mr. McLaughlin was misidentified by the single eyewitness in the case. Mr. McLaughlin received a

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[35] Jodi Wilgoren, 4 Death Row Inmates Are Pardoned, THE NEW YORK TIMES, January 11, 2003.

[36] Cases of Innocence 1973 - Present, DEATH PENALTY INFORMATION CENTER, Washington, D.C., available at http://www.deathpenaltyinfo.org/article.php?scid=6&did=109, (March 29, 2005).

$1.93 million financial settlement to compensate him for his wrongful conviction.[37] Mr. Hohne was once a supporter of capital punishment, but this experience has caused him to change his view and oppose the death penalty.

Juan Melendez told the Committees that he is the 99th of 117 death row inmates exonerated and released since 1973. DNA evidence was not available in his case, he said, and only played a role in 14 out of the 117 cases where the defendant was exonerated. After several appeals to the Supreme Court of Florida, he was able to get his case into a different county, he said, where he was finally able to reverse the conviction and win his freedom.

Sammie Thomas was wrongly convicted of murder in Auburn, New York. Mr. Thomas told the Committees he was imprisoned for more than four years. After the Court of Appeals ordered the prosecution to turn over certain exculpatory documents, he said, Mr. Thomas was retried and promptly acquitted.

John Restivo was convicted of rape and murder in Nassau County and served 18 years in prison. In 2003, his conviction was overturned and Mr. Restivo was freed. DNA tests, he told the Committees, showed that another man committed the crime. He testified that, "I served 6,566 days in New York's toughest prisons for a crime I did not commit".

Yusef Salaam and Karey Wise were convicted of participating in the brutal rape and beating of a woman in New York's Central Park, a case which became known as the "Central Park Jogger" case. The two were freed when DNA evidence identified another man as the attacker. Mr. Salaam and Mr. Wise testified before the Committees. Mr. Salaam said he believes widespread publicity about the case prejudiced the jury and contributed to their erroneous convictions.

Several witnesses disputed contentions that the conviction of innocent persons is commonplace. Professor Robert Blecker of New York Law School acknowledged that an innocent person may have been executed in the modern era. But he noted that not one such instance of wrongful execution has been documented or proven.

Reports that up to 130 people have been released from death row due to innocence are exaggerated, he said. Professor Blecker's informed estimate is that in recent years, 30 people released from death row did not commit the crime. Professor Blecker testified that Professor James Liebman's study citing a 68 percent error rate in capital cases is erroneous because, Professor Blecker said, in many instances where a death sentence was overturned, a new death sentence was imposed after later appeals or after a new sentencing proceeding.

As currently constructed, Professor Blecker believes New York's death penalty law goes quite far toward protecting against the conviction of innocent persons. Professor Blecker offered two suggestions he said would help protect against persons not deserving the death penalty from being sentenced to death. First, he suggested that jurors be specifically instructed that they may

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[37] McLaughlin v. State, N.Y.L.J. Oct. 27, 1989, at 25, col. 4; see also N.Y. TIMES, Oct. 19, 1989, at B28, col. 1.

extend mercy by sparing the defendant's life. Jurors, he said, should also be told that "righteous anger or indignation can help inform the morally correct verdict of life or death."

Professor Blecker also stated that penalty phase jurors should be instructed that they may spare the defendant's life if they harbor lingering or residual doubt about the defendant's guilt. Professor Blecker would require that judges instruct the jury that no death sentence may be imposed unless the jury is "convinced to a moral certainty" that the defendant deserves to die.

According to Sean Byrne of the New York Prosecutors Training Institute, every defendant convicted under New York's 1995 death penalty statute was "indisputably guilty." "Their attorneys," Mr. Byrne said, "routinely admitted their clients' guilt in opening statements of their trials." Furthermore, Mr. Byrne said, studies by prosecutors around the country have shown that the majority of persons allegedly "exonerated" in the United States, as reported in various studies, were "factually guilty" but were freed because key evidence proving their guilt was suppressed, or because retrial was not possible for other reasons.

3. Cost of the Death Penalty

The Committees heard testimony from witnesses who asserted that the financial cost of a state criminal justice system with a death penalty greatly exceeds the financial cost of a non-capital system, including a system that includes sentences of life imprisonment without parole. Many of these witnesses argued that if crime prevention is the goal, the money earmarked for capital prosecution could be better spent on improved policing, including crime prevention and investments in efforts to solve and punish crimes.

Other witnesses disputed these claims and contended that cost-savings generated by capital punishment were substantial.

Professor Blecker told Committee members that a fair analysis of the cost of the death penalty must credit the savings accrued from crimes prevented and deterred. Additionally, Professor Blecker asserted that substantial savings (which, in his view, decidedly tip the fiscal balance in favor of the death penalty) accrue from trials avoided, that is, when guilty defendants plead guilty to non-capital charges, rather than face the prospect of a capital trial and possible execution.

Regarding New York's expenditures to administer the capital punishment law, Sean Byrne of the NY Prosecutors Training Institute asserted that "[t]remendously more money is made available for the defense of capital cases (four to five times more) than for capital prosecution, but prosecutors appear to have been adequately funded to date." Mr. Byrne pointed out one key area that was overlooked by the 1995 law: funding for police agencies "that have to handle massive workload increases in capital cases."

Schenectady County District Attorney Robert Carney noted that expenditures for death penalty prosecution and defense have cost New Yorkers as much as $200 million since 1995. "There are," he said, "many criminal justice initiatives that are effective in reducing crime that could be enhanced for a fraction of this money."

Testimony submitted by Thomas P. Sullivan, a former member of the Ryan Commission in Illinois, offered the view of one judge: "The death penalty has great popular appeal, but I don't think the taxpayers have looked at the bottom line. The death penalty is damn expensive."[38] Mr. Sullivan presented a state-by-state analysis of the cost of capital cases. He stated that it costs states from a third to as much as three times more for a death penalty case than to adjudicate a non-death penalty case.

Richard Dieter of the Death Penalty Information Center, who also is an adjunct professor at Catholic University Law School, believes the question of cost as it relates to the death penalty is a central issue. He argued that having the death penalty means sacrificing compensation for victims' families, funds for more police and even more prison space. Mr. Dieter noted that the Ryan Commission in Illinois made eighty-five recommendations, most of which, he said, would make the Illinois death penalty even more expensive.

Mr. Dieter argued that most states have a symbolic death penalty. He said that in most jurisdictions, a significant majority of death sentences are overturned and life sentences are imposed instead. Thus, he asserted, most states that have the death penalty pay the significantly higher costs associated with trying a death penalty case, but frequently end up with a non-death sentence anyway.

Mr. Dieter also argued that expenses associated with the death penalty are "top heavy," meaning that most costs occur quickly during the trial and early appeals, rather than being spread out over a long period of time, as in the case of a person who is sentenced to a life term for murder. Special procedures, including the fact that capital trials have two phases, add to the costs. Mr. Dieter asserted that with so significant a portion of the cost of capital cases coming early in the representation, the cost of death penalty cases quickly surpass those of non-death penalty cases, eclipsing even the costs associated with forty years or more of imprisonment for non-capital defendants.

Mr. Dieter testified that a two-year North Carolina study concluded that it cost North Carolina $2.6 million more per case for each conviction that resulted in the defendant's execution than for each similar North Carolina case that did not result in execution. Also, he asserted that the cost of an execution in California is $90 million.

A Dallas Morning News report, he said, concluded that a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for forty years. A Miami Herald report, he said, estimated that Florida spends $51 million a year more for death penalty cases than it would cost to punish all first-degree murderers with life in prison without parole.

Mr. Dieter added that the higher costs of capital prosecution are concentrated on a small group of people. He argued that instead, government should spend these funds on programs that might benefit a much larger group.

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[38] Testimony of Thomas P. Sullivan, December 15, 2004 (quoting Fulton County, Georgia, Superior Court Judge Stephanie Manis, ATLANTA JOURNAL-CONSTITUTION, May 12, 2002).

Mr. Dieter contended that significant costs associated with trying a death penalty case are paid by county governments which, he asserts, can least afford them. These circumstances, Dieter argued, also have racial implications: wealthier counties with wealthier governments are more likely to seek the death penalty. So, he concluded, cost issues associated with the death penalty can lead to the arbitrary administration of capital punishment.

Mr. Dieter added that if New York reinstates the death penalty, an execution likely will not occur for at least ten to fifteen years. The cost will exceed hundreds of millions of dollars, and these expenditures will not necessarily make the streets safer. He also reasoned that taxpayer resources can be better used for crime prevention and to address other societal concerns.

James Rogers of the Association of Legal Aid Attorneys ("ALAA") in New York City claimed the costs associated with the death penalty in New York are "astronomical." In one case defended by ALAA members, he said, each side spent more than $100,000 on jury consultants alone. Mr. Rogers pointed out that resources for the needs of the entire indigent defense system are lacking. He too asserted that monies diverted to death penalty cases could be better spent improving resources for the rest of the criminal justice system.

James Liebman, a Columbia University Law School professor, predicted that reinstatement of the death penalty, over a term of about twenty years, would cost New York taxpayers approximately $500 million, likely with only two or three executions during that time. This, he calculates, means the added cost to taxpayers of each New York capital case that results in execution would be approximately $200 million per execution.

Several witnesses asserted that capital punishment is more expensive than life imprisonment without parole. Mr. Sullivan of the Illinois Commission offered several reasons why, in his view, the cost of capital prosecutions is greater than the cost of non-capital LWOP prosecutions, including:

- Investigations are longer and more costly;
- Representation costs are higher;
- Every procedural phase is longer, involving more experts;
- Many jurisdictions require a separate sentencing phase;
- Appeals are generally automatic;
- There are usually extensive post-conviction proceedings in state and federal court; and
- Death row cells are more expensive and death row inmates require greater security.

Kathryn Kase, a criminal defense lawyer who has worked in both New York and Texas, described Waller County, Texas, a rural county outside Houston. Waller County, she said, has not prosecuted a capital murder in recent memory, although murders do occur in the county. Ms. Kase said the death penalty is not sought in Waller County because the county simply cannot afford it.

Questions about the cost of the death penalty overlap with questions about fairness and consistency. Ms. Kase asserted that in New York more populated counties with higher land values and, therefore, greater tax revenues, are more able to pay capital costs, and thus, she believes, more likely to seek the death penalty. Ms. Kase asserted that this reason for seeking or not seeking a death sentence is at odds with the United States Supreme Court decision in Gregg v. Georgia) (death penalty may not be imposed arbitrarily or capriciously).

Since 1996, New York State has provided "Capital Prosecution Extraordinary Assistance" funds to some counties to partially offset the cost of capital prosecutions. In addition, under Judiciary Law Section 35-b, death penalty defense costs in New York are paid by the state.

Professor Bennett Gershman of Pace University Law School indicated that the cost for a recent eight-month capital murder trial in Westchester County (People v. Alvarez, which resulted in an LWOP verdict) was $4 million. At the time, Professor Gershman wrote, the county budget was being cut and the District Attorney announced that she had insufficient funds to prosecute probation violators and other serious offenders.

Jonathan Gradess of the New York State Defenders Association argued that New York's system for defending poor persons is stretched beyond capacity, even without considering capital cases. Mr. Gradess said that a study prepared by his association shows that in the last New York capital case tried in 1984, before the passage of the present death penalty law, the prosecution outspent the defense by a ratio of ten to one. Mr. Gradess finds appropriations to fund death penalty prosecutions untenable in light of rising health care costs. He argues that diverting monies to execute one nineteen-year old, impoverished youth would place thousands of elderly New Yorkers at medical risk.

Mr. Gradess said conservative estimates are that New York has spent $170 million in the past decade on death penalty prosecution and defense. With seven death sentences imposed, he said, the 1995 death penalty law has thus far cost taxpayers approximately $24 million per death sentence.

Kate Lowenstein, the daughter of murder victim Allard K. Lowenstein, criticized the "millions of dollars" capital states spend to try to kill one person. She argued that such resources are better used to support law enforcement and investigate unsolved crimes. Similarly, Marsha Weissman of the Center for Community Alternatives suggested diverting these large amounts of money to education, crime prevention and family support programs.

4. Aggravating Factors and the Scope of New York's Death Penalty Law

New York's death penalty law allows prosecutors to seek capital punishment when one of twelve statutory aggravating factors is present.[39] Some witnesses thought this list of twelve qualifying factors should be expanded; others thought the list should be reduced.

Professor Russell Murphy of Suffolk University Law School accompanied Debra Jaeger during her testimony. As noted earlier, Debra Jaeger's sister, Jill Cahill, was killed by her estranged husband in 1998. In his written submission, Professor Murphy argued that the list of aggravating factors under New York's death penalty law should be expanded in four respects.[40] First, Professor Murphy urged that deliberate, premeditated, cold blooded, calculated murders be added to the list of death-eligible killings.

Second, Professor Murphy recommended a new distinct aggravating category, allowing the death penalty when intentional murder is the "culminating event in a pattern" of domestic abuse or domestic violence. Third, Professor Murphy urged that the intentional murder of a "highly vulnerable or incapacitated victim" should qualify the defendant for capital punishment, when the defendant knew or should have known of that condition.

Fourth, to address one basis for the reversal of the death sentence of Jeffrey Cahill,[41] the killer of Ms. Jaeger's sister, Professor Murphy argued that burglary killings -- when killing alone was the object of the defendant's entry -- should be added to the list of death eligible murders.

Onondaga District Attorney William Fitzpatrick, who prosecuted Jeffrey Cahill, agreed. District Attorney Fitzpatrick explained that Jeffrey Cahill brutally beat his estranged wife with a bat. Six months later, as she lay in a hospital bed slowly recovering, Jeffrey Cahill disguised himself as hospital janitor, entered her room and forced a lethal poison down her throat. District Attorney Fitzpatrick unsuccessfully argued in the Court of Appeals that the defendant's entry into the room, when the underlying motive for entering was to commit murder, should qualify as an aggravating under the burglary-murder provision of the death penalty law.

Professor Blecker urged lawmakers to expand the categories of death-eligible murders in some ways, but narrow the categories in others. Among Professor Blecker's suggestions:

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[39] *See* Donnino, Practice Commentaries, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, N.Y. PENAL LAW § 125.27 (2004).

[40] A legislative package which would implement Professor Murphy's four recommendations and also address the Court of Appeals holding in LaValle has been introduced in the Assembly by Assemblyman Robin Schimminger (*see* A. 5523, A. 5524 and A. 5525 [2005 Legislative Session]).

[41] In People v. Cahill, 2 N.Y.3d 14 (2003), the Court of Appeals held that while murder committed in the course of a burglary is death-eligible, a (death-eligible) first degree murder charge may not be brought when the object or purpose of the defendant's unlawful entry was to accomplish the killing, not to commit a separate crime such as robbery or theft.

- Abolish the felony murder aggravator (murder committed in the course of crimes such as robbery or burglary) and expressly define rape murder as "torture murder" qualifying the defendant for death;

- Expand and redefine torture killings;

- Add killings that are particularly cruel;

- Eliminate death sentences for life-sentenced inmates who kill;[42]

- Narrow the categories of law enforcement officer killings to encompass only those persons who kill police officials because they are police officials;

- Add killings of especially vulnerable persons;

- Refine the witness elimination killing rule to apply only to the killing of innocent witnesses (not co-perpetrators or "professional snitch" witnesses);

- Add "depraved indifference recklessness" as a mental state qualifying a murder defendant for death.

District Attorney Michael Green of Monroe County noted than only seven persons have been sentenced to death in the first ten years of the New York death penalty law. The death penalty, he said, has been sought at trial in only eighteen of more than 8,000 murders. District Attorney Green assured the Committees that prosecutors and juries have shown appropriate restraint in applying the death penalty to the worst offenders. In the interest of expediency, D.A. Green recommended that the Legislature address the deadlock issue LaValle presents, but not consider other changes to the death penalty law at this time.

Sean Byrne of the NY Prosecutors Training Institute agreed that amendment of the first degree murder statute in New York is "not immediately necessary." "The immediate need facing the State," Mr. Byrne wrote in his submitted statement, "is to remedy the flaw created by the Court of Appeals in LaValle so New York can again have a workable death penalty statute."

Other witnesses testifying before the Committees urged a narrowing of the list of aggravating factors. Testifying for New Yorkers for Fairness in Capital Punishment, Michael Whiteman, a former counsel to Governors Rockefeller and Wilson, urged that New York's list of aggravators be significantly scaled back.

Professor William Bowers of Northeastern University discussed several studies conducted in states outside New York by the Capital Jury Project. One recent study, Professor Bowers said, revealed that in capital cases, jurors mistakenly believed they were required to

[42] Professor Blecker argued that this group is most likely to be deterred by punitive segregation or prison transfer, and that the death penalty should apply in this context only if another aggravating factor is present.

impose a death sentence if the crime was heinous, vile or depraved. The use of aggravating factors to mandate a death sentence is unconstitutional, Professor Bowers said, yet jurors frequently mistakenly believe a death sentence is required.

Representatives of several law enforcement groups testified for and against the death penalty, particularly as it relates to the killing of a law enforcement officer. In a letter to the Committees, Jeff Frayler of the New York State Association of Police Benevolent Associations urged that the death penalty be available for the killers of police officers, judges, witnesses and family members, contract and serial killers, heinous killers and persons who commit terrorist acts.

Michael Palladino of the Detectives Endowment Association also urged that the death penalty be retained. Mr. Palladino reported that in the past three years, six detectives of the New York City Police Department have been killed. Mr. Palladino reminded the Committees that the men and women of law enforcement place their lives at great risk every day to protect New Yorkers. The death penalty is needed, he said, to give these officers better odds of returning home to their loved ones at the end of a dangerous tour of duty.

Lou Matarazzo, former president of the Police Benevolent Association, noted that several years ago, thirteen police officers were murdered in one year on the streets of New York. Mr. Matarazzo believes the death penalty is needed to assure that police officers are protected.

Ron Stalling, a retired officer of the uniformed U.S. Secret Service representing the National Black Police Association, urged that the death penalty not be used in New York. Anthony Miranda of the National Latino Officers Association decried the killing of any official. But his association strongly opposes the death penalty because of inherent injustices in the criminal justice system.

Marsha Lee Watson of the NYS Correction and Law Enforcement Guardians Association testified in opposition to the death penalty. Ms. Watson believes all life is sacred. She believes the law should not elevate the value of a police officer's life above that of other individuals.

Randy Jurgenson, a retired NYPD homicide detective, does not believe capital punishment deters murder. Detective Jurgenson recalled a murder arrest he made more than 36 years ago. The defendants were convicted and sentenced to 25 years to life imprisonment. They have been continuously denied parole. This, and the additional sentence of LWOP now on the books, convinces him that the death penalty is not needed.

Charles Billups, on behalf of the Grand Council of Guardians, a coalition of New York's African-American police, correctional, parole and probation officers also voiced opposition to the death penalty in New York.

5. Life Imprisonment Without the Possibility of Parole (LWOP)

Most presenters at the Committee hearings supported the availability of life imprisonment without the possibility of parole (LWOP) as a sentence option in New York.

148 persons have reportedly been sentenced to life imprisonment without the possibility of parole since the enactment of the 1995 law.[43] This stands in sharp contrast to the seven defendants who initially received death sentences.

Several witnesses contended that LWOP is a sufficiently harsh penalty for the worst offenders. Some identified LWOP as a more severe sanction than execution. Bill Pelke, a founding member of Murder Victim Families for Human Rights, said LWOP is no "picnic"; "anybody who thinks that it's some sort of country club," he said, "has not been in a prison and seen people on death row."

Catherine Abate, a former NY State Senator and former Commissioner of the NYC Departments of Correction and Probation, pointed out that opinion polls show a majority of Americans oppose the death penalty when offered the alternative of life imprisonment without the possibility of parole. Andrew Cuomo, former Secretary of the U.S. Department of Housing and Urban Development, told the Committees he believes public opinion has turned strongly away from the death penalty in recent years.

Professor Robert Blecker of New York Law School agreed that, like the death penalty, LWOP can be a deterrent. He mentioned several studies which, he asserted, show that capital punishment is a greater deterrent than LWOP. Professor Blecker believes execution is the ultimate threat. There are behaviors, he testified, that a person might not engage in for fear of dying, that a person would engage in even if it meant a possible loss of liberty.

Professor Blecker noted that persons sentenced to prison often have access to regular activities like reading, exercise, watching television and developing friendships. The people who are the worst of the worst, Professor Blecker testified, do not deserve all of these privileges.

John Dunne, a New York State Senator for twenty-three years and a former Assistant Attorney General for Civil Rights at the United States Department of Justice, voted "twelve times to establish the death penalty in New York." During the hearing, Senator Dunne spoke of "struggl[ing] for more than forty years with this issue" and urged the Committees to "use those bloodless means that are associated with life imprisonment without parole, to cap our punishment for a first degree murderer with that sentence, and to use the resources thereby saved to improve the quality of life for all our citizens."

6. Mental Retardation

In 1989, in Penry v. Lynaugh,[44] the U.S. Supreme Court, analyzing Eighth Amendment questions involving "evolving standards of decency," determined that there was not a sufficient national consensus to require an end to the application of the death penalty to mentally retarded

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[43] *See* Jonathan Gradess, testimony February 8, 2005; *see also* The Meaning of Life: Long Prison Sentences in Context, THE SENTENCING PROJECT, Washington, D.C. (reporting that as of May, 2004, New York had 110 people serving LWOP).

[44] 492 U.S. 302 (1989).

defendants.[45] Late in 2004 however, in Atkins v. Virginia,[46] the Court concluded that executing persons with mental retardation would violate the Eight Amendment prohibition against cruel and unusual punishment.

New York's death penalty law permits capital prosecution and the execution of mentally retarded persons, but only when the defendant was a jail or prison inmate, the victim was an employee of the jail or prison engaged in official duties, and the defendant knew or reasonably should have known that the person was so employed. Asked whether, in light of Atkins, New York's limited exception allowing the execution of mentally retarded prisoners would pass federal constitutional muster, Professor Blecker concluded that the U.S. Supreme Court has ruled on the issue, and no state may execute a mentally retarded person under any circumstances. No witness disagreed. Professor Blecker noted, however, that the high court had left it to each state to determine what, in fact, constitutes mental retardation.

7. Mental Illness

The Bureau of Justice Statistics estimated in 1998 that, on average, 283,000 persons with mental illness are incarcerated in jails and prisons in the United States.[47] Ron Honberg of the National Alliance for the Mentally Ill (NAMI) testified that, in his view, the criminal justice system in many of the nation's communities has become the *de facto* mental health treatment provider.

Mr. Honberg estimates that twenty percent of the persons sentenced to death in the U.S. have a serious mental illness. "[O]nly ... after [these] crimes were committed, was treatment provided, usually for the purpose of achieving competence to stand trial. Frequently, more money is spent executing people with severe mental illness than was [spent] on providing treatment."

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[45] According to the NYS Office of Mental Retardation and Developmental Disabilities:

> People with mental retardation show delays in learning, a slower pace of learning, and difficulty in applying learning. Approximately 200,000 people in New York are thought to have mental retardation. Mental retardation can result from a variety of factors, among them premature birth, genetic abnormalities, malnutrition, exposure to toxic agents, and social deprivation. Assistance for people with mental retardation usually includes diagnosis and help early in their life, family counseling and training, education, job training, and housing services, available at http://www.omr.state.ny.us/hp_faqs.jsp#q9 (March 27, 2005); *See also* N.Y. MENTAL HYG. LAW § 1.03 (21) (defining "mental retardation" as "subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior").

[46] 536 U.S. 304 (2004).

[47] N.Y. MENTAL HYG. LAW § 1.03 (20), defines "mental illness" as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation."

Professor John Blume of Cornell University Law School testified that severe mental illness can make a defendant appear more dangerous. In many cases, he said, jurors' perception of the defendant's dangerousness drives a juror's life or death decision. In addition, a mentally ill defendant is less likely to appear remorseful, as a result of medication or the illness itself, yet research shows that jurors' perceptions concerning a defendant's remorse (or apparent lack of remorse) can be a significant factor in the choice between life and death.

On a related topic, Professor Xavier Amador of Columbia University contended that the competency standard under New York law in most proceedings is much too low. "As a New York attorney described it," Professor Amador said, "if the defendant can tell the difference between a grapefruit and a judge[,] he's competent."

Due to the adversarial nature of criminal proceedings, Professor Amador explained, psychologists and psychiatrists are generally pitted against one another and pushed toward a "battle of the experts." This, according to Professor Amador, erodes the faith of judges and jurors in the ability of experts to offer objective testimony. The adversarial system, according to Professor Amador, is inappropriate and ill equipped to the task of uncovering the truth about a defendant's mental illness, and its relevance to his or her behavior.

Mr. Honberg testified that in the vast majority of death penalty states, including New York, mental illness is among the statutory factors that may be considered as mitigating against the death penalty. Yet, according to Honberg, there is a growing view among experts that in capital cases, jurors inappropriately view mental illness as an aggravating, rather than mitigating factor.

Mr. Honberg noted a report by Professor Chris Slobogin, whom Mr. Honberg identified as an expert on mental illness and the law. According to Mr. Honberg, Professor Slobogin's report cites several studies showing this trend. For example, he said, a study of 175 capital cases in Pennsylvania demonstrated that all aggravating and mitigating factors listed in that state's death penalty statute correlated positively with the eventual sentence, with the exception of extreme mental or emotional disturbance, which correlated positively with a death sentence. This, Mr. Honberg opined, means that if a defendant had a serious psychiatric diagnosis, he or she was statistically more likely to be sentenced to death. Mr. Honberg said other studies produced similar results.

According to Mr. Honberg, the research suggests two possible reasons jurors view mental illness as an aggravating, rather than mitigating factor. First, lay persons often perceive persons with mental illness as being abnormally dangerous. Jurors may view a capital defendant with schizophrenia as beyond redemption, and may conclude that no amount of treatment is likely to reduce what jurors perceive to be violent tendencies. According to Mr. Honberg, the opposite is true: psychiatric treatment has been shown to be very effective in reducing any risk of violence.

A second reason jurors may view mental illness as an aggravating rather than a mitigating factor may be cynicism. Mr. Honberg said, may jurors doubt that the mental illness really exists. Jurors may incorrectly believe the defendant is malingering, with counsel offering mental illness

as a subterfuge designed to aid the defendant in efforts to evade responsibility for his or her behavior.

Third, Mr. Honberg questioned the ability of capital defendants with active psychiatric symptoms to receive a fair trial or participate fully in their defense. Although laws in New York and elsewhere require that defendants be capable of intelligently participating in their defense, competency standards are low, Mr. Honberg said, and may be misunderstood and unevenly applied. An additional issue, according to Mr. Honberg, is the susceptibility of defendants with mental illnesses to coercion. Defendants, he asserted, may be coerced into making false confessions or waiving the right to counsel.

Attorneys face special challenges in defending capital cases when the defendant has a serious mental disorder. Mr. Honberg testified that it is common for individuals with schizophrenia and other severe mental illnesses to deny they are ill or need treatment. Often, this leads to the defendant's refusal to permit counsel to raise competency questions or assert an insanity defense.

For example, Professor Amador testified that accused serial bomber Ted Kaczynski attempted to dismiss his attorneys when he learned they planned to use evidence of schizophrenia in an effort to save him from execution.

Michael Whiteman of New Yorkers for Fairness in Capital Punishment testified that New York's death penalty law does not expressly allow defense lawyers to override a defendant's wishes and present mitigating evidence of severe mental illness. He urged that the New York law be amended to assure that mitigating evidence can be presented, even over the defendant's objection. Moreover, Mr. Whiteman believes "[a] documented past diagnosis or current judicial finding of significant mental illness should bar a death sentence."

Mr. Honberg and Professor Blume also testified about the emergence of so-called "volunteer defendants." These are defendants who insist on pleading guilty or who forego appeals in an attempt to hasten their execution. Professor Blume stated, based on his research, that seventy percent of "volunteer defendants" are persons who have been diagnosed with a mental illness. He testified that there is a high incidence of the most severe mental illnesses among "volunteer defendants", including schizophrenia, depression and bipolar disorder. Mr. Honberg testified that often, the desire among these defendants to die is symptomatic of the severity of their illnesses. Further, Professor Blume said, "volunteer defendants" frequently change their mind once they have received treatment.

In written testimony submitted for the National Alliance for the Mentally Ill, New York State, Ione Christian, Muriel Sheperd, Judith Beyer, J. David Seay and Robert Corliss urged that defendants with severe mental illness be exempt from the death penalty, under at least the following circumstances:

- Individuals with cognitive or functional limitations equivalent to those applied to defendants with mental retardation in the Atkins case would generally be exempt;

- Individuals who, at the time of their offenses, suffer from severe mental illness and act on impulses or beliefs that are the product of delusions, hallucinations or other manifestations of psychosis would be exempt; and

- Individuals whose severe mental disabilities manifest or worsen after sentencing to the extent that they are unable to understand the nature and purpose of the death penalty or to make rational decisions about legal proceedings relevant to the death penalty would be exempt.

8. Race and the Death Penalty

Several witnesses asserted that there is evidence in states throughout the nation of racial discrimination in the application of the death penalty. Many argued that in death eligible cases, the death penalty is more likely to be imposed on defendants of color than white defendants. Further, according to these witnesses, when the victim is white there is a much greater possibility that the defendant will be sentenced to death than when the victim is black.

According to witness George Kendall, the United States General Accounting Office (GAO) issued a report in 1990 evaluating 28 empirical race-and-the-death-penalty studies that have been conducted across the country. Mr. Kendall said that according to the GAO report, the victim's race was a significant factor in determining whether a defendant received a death sentence in 82 percent of the studies. For example, Mr. Kendall said, "those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks."

Mr. Kendall cited a later study conducted by Professors Baldus and Woodworth which expanded on the GAO review.[48] Professors Baldus and Woodworth found relevant data in three-fourths of the states with prisoners sentenced to death. Upon reviewing this data, Professors Baldus and Woodworth found that in 93 percent of these states, there was a correlation between the race of the victim and whether a death sentence would be imposed; that is, cases involving white murder victims were much more likely to result in a death sentence than cases involving a victim who was a person of color.

In nearly half of these states, the defendant's race also served as a predictor of who would be sentenced to death. Additional materials supplied by Mr. Kendall[49] showed that in capital states, the racial composition of the key decision maker -- the prosecutor -- is 97.5 percent white, one percent black, and one percent Latino.

Mr. Kendall identified several reasons why, in his view, it is difficult to eliminate the specter of racism from the death penalty:

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[48] D. Baldus & G. Woodworth, Race Discrimination in America's Capital Punishment System Since Furman v. Georgia (1972): The Evidence of Race Disparities and the Record of Our Courts and Legislatures in Addressing This Issue, (1997).

[49] *See also*, Richard C. Dieter, DEATH PENALTY INFORMATION CENTER, The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides, available at http://www.deathpenaltyinfo.org/article.php?scid=45&did=539 (collected on January 24, 2005).

- Our nation's long history of "tabloid reporting" of disappearances or killings of white victims followed by the arrest of a racial minority as a suspect. Such coverage, Mr. Kendall said, creates significant pressure on law enforcement to solve the case promptly and prosecute aggressively;

- A significant number of attorneys defending death penalty cases are white and some have not developed racial and ethnic sensitivities; and

- Some prosecutors routinely use peremptory challenges to remove racial minorities and women from capital juries.[50]

Professor William Bowers of Northeastern University discussed recent findings of a study conducted by the "Capital Jury Project." The Capital Jury Project study involved interviews of actual jurors who heard capital cases in fourteen states. According to Professor Bowers, the study confirmed racial bias in capital sentencing determinations. The death penalty, he said, was much more likely to be imposed in inter-racial cases involving black defendants and white victims. In addition, Professor Bowers found, death penalty sentencing is frequently biased by the juror's race, and by the racial composition of the jury.

Lillian Rodriguez-Lopez of the Hispanic Federation testified before the Committees. Ms. Lopez-Rodriguez testified that "[w]hile Latino defendants have not been subject to the death penalty at the same rate as whites or African Americans," she believes Latino defendants are prosecuted through a racially-biased system in New York that weakens democracy and undermines respect for human rights.

Professor Edward Rodriguez of Seton Hall University School of Law noted that it is impossible to design a death penalty that is fairly administered and consistently applied and free from impermissible racial and ethnic bias. Of particular concern, he said, is "the discriminatory use of peremptory challenges," which he said is the "single most significant means by which racial prejudice and bias are injected into the jury selection system."

Other witnesses submitted testimony analyzing racial data and the use New York's death penalty law since September, 1995. Professor David Baldus of the University of Iowa offered the following from his study of the New York experience:

- Seven of 500, or one percent, of first degree murder case defendants, were sentenced to death;

- Death notices were filed in 58 of these 500 cases;

- Of the 58 cases in which prosecutors filed a death notice, 12 percent of the defendants were sentenced to death (seven cases);

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[50] Richard Dieter cites cases in several states such as Pennsylvania, Alabama, and Georgia. In Philadelphia, he said, one assistant district attorney prepared a training tape for new prosecutors in which he offered advice on how to develop race-neutral reasons as a pretext for using preemptory challenges against black jurors.

- The first degree murder cases involving white victims were 3.3 times more likely to receive a death notice than those where the victim was non-white;

- Among the seven defendants who received the death penalty, white victim cases outnumbered non-white victim cases by a two to one margin (62 percent vs. 29 percent); and

- Black defendants were 59 percent of first degree murder cases and 43 percent of those sentenced to death.[51]

Several witnesses introduced similar statistics compiled by the New York State Capital Defender's Office.[52] Based on these records, Ann Brandon of the League of women Voters reported that of the seven defendants sentenced to death under the 1995 New York law, three are black, three are white and one is Hispanic.

Several witnesses offered suggestions to reduce racial disparities in New York sentencing practices. Professor Baldus recommended that a detailed study be conducted of racial discrimination and the New York death penalty. Other recommendations included:

- Expanding jury pools to assure diversity;

- Requiring that jurors receive express anti-discrimination instructions;

- Assuring private, individualized pre-selection questioning of jurors, to assist the parties and the courts in uncovering possible biases;

- Providing a mechanism for the review and adjudication of discrimination claims;[53] and

- Assuring that death sentences will be vacated where race-of-defendant and/or race-of-victim disparity is shown, without requiring proof of discriminatory intent.

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[51] Professor Baldus asserted: "The reason for this gap is that a substantial majority of New York black defendant cases involve a black victim which draws down the death-sentencing rate for black defendants as a group."

[52] Of 459 defendants indicted for first degree murder, 59% were Black, 19% were White and 21% were Hispanic. Death notices were filed in 50 cases; 48% were Black, 40% were White, and 10% were Hispanic. Race of the victim was known in 446 cases; 42% were Black, 31% were White, and 20% were Hispanic (the remaining victims were of multiple races). Race of the victim in the death-noticed cases equaled 30% Black, 48% White, and 14% Hispanic (Statement of Ann Brandon, The League of Women Voters of New York State).

[53] For example, Kentucky has adopted a Racial Justice Act which authorizes defendants to bring claims of racial discrimination in the charging of the jury or in the sentencing decision in his or her case. Professor Baldus claims this law "has made people, made prosecutors, much more sensitive to the racial consequences of what they have done."

Other witnesses contended that there is little or no evidence of racial bias in the use of the death penalty. For example, Sean Byrne of the New York Prosecutors Training Institute referred to a June, 2002 report of the U.S. Justice Department. The report, he said, analyzed more than 900 federal death-eligible cases, and reportedly found no evidence of racial bias. A study of proportionality review in New Jersey, he said, concluded that there was no evidence of bias against black defendants. A 2002 report by the New Jersey Supreme Court Special Master, David Baime, Mr. Byrne said, found no evidence of bias during the period of August, 1982 to May 2000. A recent Nebraska study concluded that race is not a factor in Nebraska death penalty cases, Mr. Byrne said.

Mr. Byrne also cited a report of the U.S. Bureau of Justice Statistics, "Capital Punishment 2003." Of the persons under a sentence of death in the United States in 2003, Mr. Byrne said, "56 percent are white, 42 percent are black, and 2 percent are other races."

Professor Blecker of New York Law School also offered statistical evidence to refute claims that there is racial bias in the death penalty system in the U.S. He testified:

> Does a black killer stand a better chance of being executed because s/he's black? . . . Another way of asking it - if you're black, is Society more ready to execute you than if you're white? Happily the answer is clearly and unequivocally no! In the modern era (1977-2003) 510 [of] 3451 whites sentenced to death have been executed; 301 [of] 2903 blacks sentenced to death have been executed. In other words we have executed 14.8 percent of our white condemned, but only 10.4 percent of our black condemned. On average, during the modern era, it has taken us 8 months *longer* to execute a black, although this disparity has reversed the past two years. (Bureau of Justice Statistics, Nov. 2004).

The well-known 1990 study by Professor Baldus regarding Georgia's death penalty law, he said, instead shows there is little bias in Georgia's death penalty:

> Specifically the odds that the average black defendant will receive a death sentence are 56 percent of those faced by a white defendant in a comparable case.

Professor Blecker thus claims that the bias in the modern era, if any, has been against white defendants, not in their favor, "although adjusted for case culpability, that bias too largely dissipates."

> . . . Except to score debating points, rarely do informed abolitionists claim primary racism, i.e. a systemic race-of-*defendant* bias or impact. Now the attack is almost exclusively directed to the *race-of-victim* bias, or effect: Those who kill whites are sentenced to die more frequently than those who kill blacks, the evidence does consistently show. Why is that, and what does it mean? . . . [T]he Maryland study shows [the answer is] primarily found in the likelihood of a prosecutor seeking the death penalty. After that, there is no additional racial effect.

> Why do prosecutors more frequently seek death where there are white victims than where there are black victims? The Maryland study, Baldus' Nebraska study, and Judge Baime's recent New Jersey study all show the same thing: [t]he county - the jurisdiction - in which the murder is committed and thus the particular prosecutor's office, primarily accounts for the disparity. In populous states, suburban prosecutors tend to seek death more frequently than urban prosecutors. Capital murders are more frequently of white victims in suburban counties; more frequently of minority victims in urban counties. Thus white victim cases more frequently get prosecuted capitally than black victim cases.

Finally, Professor Blecker argued that differences in the use of the death penalty between urban and suburban counties reflect fiscal concerns, not racial bias. Urban counties, he said, generally have less financial resources than suburban counties. Further, Professor Blecker said, New York's definition of capital murder includes intentional killings in conjunction with robbery and burglary, crimes which are disproportionally race and class biased.

Michael Palladino of the Detectives Endowment Association also disavowed the existence of racial disparities in the use of the death penalty:

> [A] popular position of the opponents to capital punishment is that it is selectively enforced based upon race or ethnicity. I don't believe that for one minute. Capital punishment is an issue of old-fashioned good versus evil. It's about the just punishment for heinous and egregious acts of murder. It's about deterring such reprehensible deeds. Although we cannot definitively measure the statistic, if capital punishment prevents or deters just one horrible deed, if it saves just one innocent life, then it has performed its duty.

New York's death penalty law requires that, on appeal from any death sentence, the Court of Appeals must review the sentence and consider whether it is disproportionate to other murder convictions imposed in the state.[54] In its review, the court must determine:

- Whether the sentence imposed was influenced by an arbitrary or legally impermissible factor including, but not limited to, passion, prejudice, or in the case of the verdict and/or sentence, the race of the defendant or the race of the victim;

- Whether the sentence is excessive or disproportionate in comparison to similar cases, including consideration of the race of the defendant and the victim of the crime; and

- Whether the decision to impose the sentence was against the weight of the evidence.

In each first degree murder case that results in a conviction, the clerk of the trial court must review the record, consult with the prosecutor and defense lawyer, and prepare a data report to assist the Court in its proportionality analysis.

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[54] N.Y. CRIM. PROC. LAW § 470.30; N.Y. JUD. LAW § 211-a.

Professor Baldus noted significant limitations with respect to New York's proportionality review requirement. First, the Court of Appeals does not receive data reports in all death-eligible cases. Second, the Court does not appear to have developed a system for professional analysis of its database. Third, it is unclear if the Court is developing a database of detailed and accurate narrative summaries of the cases, with input from both prosecutors and the defense, which is crucial to the actual review of cases for purposes of determining comparability. With the adoption of improvements along these lines, Professor Baldus said, the Court of Appeals would be better able to appropriately monitor and compare murder case sentences.

Sean Byrne urged that proportionality review by the Court of Appeals for potential racial bias be limited to an analysis of comparable first degree murder cases. Mr. Byrne noted that of 55 death notices filed under the statute since 1995, racial data is available on 47 cases. Calculating the percentages based on the 47 cases for which racial data is known, he says, 45 percent of the death noticed defendants in New York are black, 43 percent are white and 11 percent are Hispanic.

9. Claims of Class and Economic Discrimination

Several witnesses claimed the death penalty falls disproportionately on low income persons. Economic disadvantage, these witnesses claimed, means these defendants cannot obtain adequate legal counsel and are unable to afford expert assistance in their cases.

According to Robert Perry of the New York Civil Liberties Union, discrimination against the poor in the administration of the death penalty is well established. What most often determines the imposition of the death sentence is not the underlying facts of the case, he said, but the quality of the legal representation. Mr. Perry quoted Justice Ruth Bader Ginsberg as follows:

> I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial. . . . People who are well represented at trial do not get the death penalty.

Sean Byrne of the New York Prosecutors Training Institute praised the work of New York's Capital Defender Office.[55] Mr. Byrne and several other witnesses noted that in New York capital cases, adequate resources and skilled defense lawyers have been made available to defendants.

Professor Blecker noted one aspect of the New York law that, he believes, disproportionately favors wealthy persons and those from upper economic classes. Perpetrators of killings accompanied by robbery or burglary are eligible for the death penalty, he said, yet corporate executives who make decisions knowing their actions will cause deaths are not.

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[55] It should be noted that, in turn, Jonathan Gradess of the N.Y.S. Defenders Association praised the N.Y. Prosecutors Training Institute: "Prosecutors should not have to support capital punishment in order to achieve training and support for [their] staff. New York should keep the doors of NYPTI open, even if the death penalty comes off the ... books." Mr. Gradess continued, "The same should be true for the Capital Defender Office. Indigent defense services ... are in crisis, and that office should be used to help the state address that crisis."

Professor Blecker argues that such "red collar killers," who, for example, forego improvements on potentially dangerous products or knowingly maintain potentially hazardous work sites, should, if death occurs, be eligible for capital punishment.

10. Prosecutorial Discretion and Geographic Inconsistencies

Under most death penalty statutes, prosecutors have broad discretion to designate who among those prosecuted for murder will be exposed to a possible death sentence. Several witnesses expressed concern that this discretion could be exercised in ways that reflect class or racial bias. Professor Acker, for example, argued that the broad discretion prosecutors have to seek an indictment for first degree murder (which can be made death-eligible by the filing of a notice) or second degree murder (which is not death eligible) on the same facts, and even in the same case, represents unbridled discretion that is inappropriate and constitutionally suspect.

On the other hand, Professor Blecker contended there is no evidence anyone sentenced to death under the 1995 law is innocent, and no evidence that the death penalty in New York has been sought in a way that discriminates based on race or class.

Since 1995, the death penalty has been sought most frequently in three New York counties: Kings, Queens and Monroe. Most counties, including some of New York's most populous, have not seen any capital prosecutions. In Professor Blecker's view, resting discretion with prosecutors reflects democratic principles, since prosecutors are elected officials. Professor Blecker argues that there is no problem with geographic differences in the use of the death penalty.

Other witnesses expressed concerns about geographic inconsistencies in the use of New York's death penalty. To some, it is illogical that a killing occurring in one town may result in a death sentence while the same crime committed in another town, just across a county border, is not considered a capital crime.

Onondaga District Attorney William Fitzpatrick identified the geographic disparity argument as a classic "Catch-22." It is unreasonable, he told the Committees, to, on the one hand, vest independently elected prosecutors with discretion to seek or not seek the death penalty, and, on the other hand, invalidate convictions and sentences based on differences in the exercise of that discretion.

Stewart Hancock, a retired judge of the New York Court of Appeals, expressed concern that in murder cases, each of New York's sixty-two district attorneys is vested with vast discretion to seek upgraded first degree charges and file a "death notice" or not. Judge Hancock believes this formulation "virtually guarantees inequality and arbitrariness" in the application of the death penalty in New York.

The New York Court of Appeals has not directly addressed the issue of geographic inconsistencies in the use of the death penalty among New York's counties. On an arguably

related issue, however, the Court of Appeals upheld an executive order by which Governor Pataki substituted Attorney General Dennis Vacco for Bronx District Attorney Robert Johnson, in a potentially capital case, because the Governor believed D.A. Johnson was unwilling to seek the death penalty.[56]

11. Competence and Effectiveness of Defense Counsel

Several witnesses commented on the quality of representation by defense counsel in capital cases in New York and throughout the nation.

Sean Byrne of the New York Prosecutors Training Institute credited the Capital Defender Office, which was established in New York as a part of the 1995 death penalty law, indigent defense organizations like the Legal Aid Society and private counsel (appointed pursuant to section 35-b of the Judiciary Law) with providing "very capable" representation to New York capital defendants. Mr. Byrne and other witnesses contended that problems with underfunded and inadequate representation, arguably found in other states, are not present for capital cases in New York.

Mark Green is with the New Democracy Project and served as Public Advocate for the City of New York. Referencing When the State Kills, by Austin Sarat, Mr. Green noted that appointed lawyers provide inadequate representation in many capital cases. "Examples of incompetent and inexperienced counsel in capital cases abound," he said, "which helps to explain why so many convicted defendants in capital cases are later exonerated."

Michael Whiteman, former counsel to Governors Rockefeller and Wilson, argued in a memorandum that the New York statute is inappropriately silent on the right to appointed counsel in federal habeas corpus, state post-conviction proceedings and clemency proceedings.

Kathryn Kase, an attorney with experience in New York and Texas death penalty cases, recalled the Texas case of Calvin Burdine, whose lawyer, she said, slept through portions of his client's capital trial. Burdine's conviction and death sentence were nonetheless affirmed.[57] Ms. Kase noted that New York precedent might accept a similar result. In People v. Tippins,[58] she said, New York's Appellate Division, Second Department ruled that the standards for effective assistance of counsel are not necessarily violated when a defense lawyer sleeps through portions of a criminal trial.

George Goltzer, a board member of the New York State Association of Criminal Defense Lawyers, acknowledged that death sentences throughout the country have been reversed because a lawyer was constitutionally or otherwise legally inadequate. But in other cases, he said, even the most experienced attorneys make "strategic errors, forget to raise an objection . . . miss an

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[56] *See* Johnson v. Pataki, 91 N.Y.2d 214 (1997).

[57] *See* Ex parte Burdine, 901 S.W.2d 456 (Tex. Ct. of Crim. App. 1995) (Maloney, J., dissenting).

[58] 173 A.D.2d 512, 513, lv. denied, 78 N.Y.2d 1015 (1991).

issue, or have a bad day." One defendant, he said, will get a new trial because his lawyer objected, preserving the issue for review on appeal, while another defendant will be executed because his trial lawyer did not promptly object to the error. Mr. Goltzer asserted that this is fundamentally unfair, particularly in capital cases.

12. Religious-based Views

Testimony concerning religious views on the death penalty was primarily in opposition to capital punishment. Several witnesses urged that long sentences and life without parole are a better alternative than the death penalty. Many witnesses identified their God as sovereign, wise and omnipotent; only God, these witnesses contended, can give life and take it away.

In addition, witnesses testified that mistakes can be made through human error possibly leading to an innocent person being executed. Several testified that the hope of an execution giving peace of mind is rarely, if ever, realized.

The Steering Committee of New York Religious Leaders Against the Death Penalty[59] (hereinafter "Steering Committee"), in its "Interfaith Statement on Capital Punishment" stated that "much more can and must be done by the religious community, in particular, and by society in general to comfort and care for grieving families of murder victims, without resorting to vengeful and violent solutions."

One organization, the Brethren, a Christian Fellowship, voiced support for the death penalty. Three group members, Robert Walker, Tim Taylor and James Taylor III, spoke at the hearings. The Brethren believe the biblical phrase "vengeance is mine" means the government has the authority and responsibility to administer capital punishment for murder. The group does not believe capital punishment denies a criminal the opportunity for redemption. They believe God "has delegated to the Governments of men the responsibility to protect life, and to avenge its violent demise." Group members testified that they "support capital punishment as a deterrent to evil; for the protection of the people of New York State."

Many other speakers argued against the use of the death penalty as vengeance. The Steering Committee stated, "The death penalty is an act of vengeance that is contrary to our religious teachings, detrimental to building a civilized and violence-free society, and demeaning to all of us as citizens. Society has a right to protect itself, but it does not have a right to be vengeful."

"[T]he death penalty system is replete with fatal flaws and constant errors," the group said. "Too often it is not the crime itself but such factors as race, economics, and geography,

[59] Members of the "Steering Committee" include: Bishop Howard J. Hubbard, Roman Catholic Bishop of Albany; Rabbi Peter J. Rubinstein, Co-Chair Senior Rabbi Central Synagogue, Manhattan; Sr. Camille D'Arienzo, RSM, Co-Founder, the Cherish Life Circle, Brooklyn; Bishop Violet L. Fisher, Resident Bishop of the New York West Area of the United Methodist Church, Rochester; Rev. Thomas W. Goodhue, Executive Director, The Long Island Council of Churches, Hempstead; Rev. Daniel B. Hahn, Director, Lutheran Statewide Advocacy, Albany; The Rt. Rev. Jack McKelvey, Bishop of the Episcopal Diocese of Rochester.

politics, or the defendant's mental capacity that are ultimately significant in determining the application of the death penalty." The Steering Committee statement went on to explain, "Our legal system is a very good one, but it is nonetheless a human institution... Even a small percentage of irreversible errors is intolerable. The only way to prevent the execution of the innocent is not to execute anyone."

Roman Catholic Bishop Howard J. Hubbard of Albany and Dominick Lagonegro, Auxiliary Bishop of the Archdiocese of New York testified to the futility of vengeance. Bishop Hubbard stated, "[M]y experience and my faith lead me to conclude that while justice most certainly demands corrective punishment for those who have done grave harm, we as civilized people must not resort to vengeance, which is not only unhealthy for a society but ultimately unsatisfying for those who have been harmed."

Reverend Geoffrey A. Black of the New York Conference of the United Church of Christ stated , "Jesus teaches us to not return evil for evil. Of course this is not always the way of the world in which we live, but as Christians we are challenged not to conform to the ways of the world and the requirement of retribution is one of those ways."

Several speakers opposed the death penalty on grounds that it devalues human life. Wanda Goldstein of the Unitarian Universalist Congregation of the Catskills believes there is no system of jurisprudence that can "guarantee absolutely that no innocent person will ever be executed. Our system is designed by human beings; at every level it is human beings making the decisions. This is the strength of our system of justice. We rely upon the professionalism of our police force, prosecutors, defenders and judges, and upon the reasoned judgment of citizen juries."

Hal Weiner of the St. Saviour Chapter of the Episcopal Peace Fellowship said, "when we deliberately take a life, we are no better than the person we choose to deprive of it. We are saying that we know for a fact that this person is beyond redemption; no way that they will ever show remorse, be repentant, or show any sign of humanity. We are deciding that the person has nothing to contribute to society. There is no way to know that we are second guessing God. To God, every life is precious."

Bishop Dominick Lagonegro of the New York State Catholic Conference, Chaplains Apostle Committee, testified that "at the heart of Catholic social teaching is the knowledge that [a] human being is central, the clearest reflection of God among us. Every human being possesses a basic dignity that comes from God, not from any human quality or accomplishment, not from race or gender or age or economic status. Human life is inherently precious."

As a chaplain liaison, Bishop Lagonegro has visited correctional facilities, including Clinton Correctional Facility in Dannemora, which houses those inmates who have been condemned to death. He described this as "a very sobering experience, to put it mildly." He stated, "it is extremely challenging to bring hope when there is no room for rehabilitation. Our Chaplains advocate for basic human rights, a life of dignity and the possibility of healing and conversion. But all of these objectives are in a collision course with a death penalty law."

Strong opposition to the death penalty was voiced by, among others, Anzetta Adams, Baptist Ministers Conference of Greater New York; Bishop Jack M. McKelvey, Episcopal Diocese of Rochester; Rev. Daniel B. Hahn, Lutheran Statewide Advocacy; Rev. Thomas W. Goodhue, Long Island Council of Churches; Michael Kendall, Arch Deacon, Episcopal Diocese of New York; Ruth S. Klepper, Interfaith Impact of N.Y.S.; Rev. N.J. (Skip) L'Heureux Jr., Queens Federation of Churches; Rev. John Marsh, Unitarian Universalists for Alternatives to the Death Penalty; and Jim Morgan, Virgil to End the Death Penalty, Brooklyn.

Sister Camille D'Arienzo of the Institute of the Sisters of Mercy of the Americas and the Cherish Life Circle of Brooklyn stated, "If we exclude anyone from God's redemptive grasp, we reject God's promises and invalidate the power of Christ's crucifixion. Of course, as we learn of innocent people who have faced the death penalty, we remember that Jesus was an innocent victim of capital punishment."

The Committees heard testimony from several members of the Religious Society of Friends (also known as the Quakers). Lee Haring of the Bulls Head-Oswego Religious Society of Friends said they "try to work toward removing the causes of misery and suffering." The group urges members to support efforts to overcome racial, social, economic, and educational discrimination; bear testimony against all forms of oppression; exert influence for such treatment of prisoners as may help reconstruct their lives; and work for the abolition of the death penalty.

The Committees also heard opposition to the death penalty from Rabbi Marc Gruber, Rabbi Shlomo Blickstein and representatives of Reform Jewish Voice of New York. Rabbi Blickstein pointed out that the Bible is "obsessed with the possibility of a . . . wrongful execution . . . ." He emphasized that " . . . circumstantial evidence is not admitted in the biblical Jewish court of law . . . and in capital cases the testimony of at least two eyewitnesses is required." Rabbi Gruber added a caution from the Sanhedrin, that one "who takes vengeance destroys his or her own house." "Capital punishment," Rabbi Gruber said, "will not address the problem of violent crime; it will only help us to be more callous in the face of killings."

13. National and International Trends in the Use of the Death Penalty

Thirty-eight states have enacted the death penalty. Since 1976, the following states have conducted the most executions: Texas (340 executions), Virginia (94) and Oklahoma (76). Connecticut, New Hampshire, New Jersey and South Dakota all have active death penalty laws but have performed no executions.

Twelve states -- Alaska, Massachusetts, Rhode Island, Hawaii, Michigan, Vermont, Iowa, Minnesota, W. Virginia, Maine, N. Dakota, Wisconsin -- and the District of Columbia have abolished the death penalty.

On December 17, 2004 the Kansas Supreme Court struck down that state's death penalty law.[60] The Court ruled unconstitutional a provision that appeared to require jurors to impose a

[60] Kansas v. Marsh, 102 P.2d 445 (2004).

death sentence if the jurors found aggravating and mitigating factors to have equal significance and weight.

Professor William Hellerstein of Brooklyn Law School identified states with the most exonerations of wrongly convicted defendants from 1989 to 2003. These are Illinois (54), New York (35), Texas (28), and California (22). He noted that these are among the states with death penalty laws.

Professor James Liebman of Columbia University School of Law testified concerning the research he conducted with colleague Jeffrey Fagan. Professors Liebman and Fagan examined the outcome of 6,000 death sentences imposed and reviewed in the United States. Professors Liebman and Fagan found that in the death penalty states they studied, the error rate for capital cases was 50 percent or more. Moreover, a person on death row had a greater chance of having his or her death sentence overturned than having it upheld on appeal. New Jersey had a reversal rate of 87 percent; Connecticut and New York had capital case reversal rates of 100 percent for the period studied.[61]

Robert Perry of the New York Civil Liberties Union testified concerning the Illinois moratorium. In 2000, Governor George Ryan declared a statewide moratorium on executions after it was established that thirteen people sentenced to death under Illinois' most recent death penalty law were not guilty of their crimes. A bipartisan commission appointed by Governor Ryan made eighty-five recommendations it said were necessary to help prevent such wrongful convictions.

Gerald Kogan, a retired Chief Justice of the Florida Supreme Court, testified concerning his experience with the death penalty in Florida. During Judge Kogan's tenure on Florida's high court, twenty-eight persons were executed in that state. In most of those cases, Judge Kogan voted to uphold the verdict and death sentence.

Judge Kogan acknowledged that "not only ... guilty people get convicted in a court of law, but there are innocent people who are also convicted. " DNA evidence, he said, has brought an objective way to demonstrate certain wrongful convictions. According to Jusdge Kogan, twenty-five persons have been released from death row in Florida, not only due to DNA evidence, but also due to faulty eyewitness identifications and evidence of coerced confessions. Judge Kogan urged the legislature not to restore the death penalty in New York.

Professor James Liebman identified what he considers three distinct state death penalty models. First, he said, is the "Texas model." States following this model have a high number of executions. Procedural shortcuts are taken to save time and money. This results in poor trial and appellate procedures. These states run a higher risk of error, reversals and retrials.

The second model reflects the practices of California and Pennsylvania. These states make heavy use of their death penalty statutes but also make a concerted effort to control error at

[61] It should be noted that the New York reversal rate cited here reflects only four cases, all of which were reversed on appeal.

both the trial and appellate stages. This results in few executions with a moderate risk of executing innocent persons.

For example, Professor Liebman said, California in the past twenty-seven years has had 650 people on death row. During that time, eleven persons have been executed. In the same period, Pennsylvania had 250 people on death row. But, according to Professor Liebman, Pennsylvania executed only three persons, each of whom requested that further appeals be withdrawn.

The third model, Professor Liebman said, is one that New York ("besides Monroe and Suffolk County") appears to have been following. This involves relatively careful trial and appellate procedures and concomitant high costs. This also means low numbers of death verdicts and executions. Professor Liebman projected that if New York were to continue with this approach, it would likely see one or two executions each year.

Dr. William Schulz of Amnesty International, USA testified about international trends in the use of the death penalty. The United States, he said, is one of the few industrialized nations in the world that retains the death penalty. Countries like Argentina, Australia, France, Hungary and Mozambique have abolished the death penalty. China, Iran, Vietnam and the United States, he said, account for 84% of judicial executions worldwide.

Dr. Schulz contended that when countries move toward a more democratic form of government, they often abolish the death penalty. Countries such as Haiti, Paraguay and Romania, he said, recently abolished capital punishment. In 1991, the South African government declared a moratorium on the death penalty when it released Nelson Mandela and opened negotiations with the African National Congress. This resulted in the abolition of the death penalty in South Africa in 1995, Dr. Schulz said. Sean Byrne of the Prosecutors Training Institute noted, however, that the largest democracy in the world (India), the most populated country in the world (China) and the largest country geographically (Russia) all allow capital punishment.

Dorit Radzin of Human Rights Watch contends that by retaining the death penalty, the United States undermines its ability to promote democracy and human rights in other nations. According to Ms. Radzin, since 1990 more than thirty-five countries have abolished the death penalty. Ms. Radzin also pointed to international human rights law, as codified in the International Covenant on Civil and Political Rights, which, she said, favors the abolition of capital punishment, although it does not prohibit executions categorically. The United Nations Commission on Human Rights, she said, has approved resolutions opposing the death penalty.

Most European nations, Ms. Radzin said, have long opposed the death penalty. Protocol 13 to the European Convention on Human Rights went into effect in 2003, and calls for abolition of the death penalty in all circumstances, without exception, she said. Professor Blecker expressed the view that European political opposition to the death penalty does not reflect the views of the majority of the European people.

14. Prosecution, Jury Selection and the Capital Trial Process

Russell Neufeld, an attorney who has defended persons charged with capital crimes, noted that New York's death penalty law does not include different or expanded rules or procedures for the disclosure of information, or "discovery", in advance of trial when compared to other criminal cases. Mr. Neufeld argued that more expansive disclosure laws are needed to help avoid erroneous convictions.

Michael Whiteman, who served as counsel to Governors Rockefeller and Wilson and testified for New Yorkers for Fairness in Capital Punishment, agreed. His group, first formed in 1995, continues to believe "reliable trials require comprehensive pretrial discovery."

Several witnesses commented on the different procedures for jury selection in capital cases as opposed to other criminal cases. Professor James Acker of SUNY Albany argued that it is unfair that persons with strong convictions against capital punishment are not allowed to participate in any aspect of a capital trial. Professor Bennett Gershman of Pace University Law School agreed. Under Wainwright v. Witt,[62] he said, prosecutors can "skew" the fact-finding process in the guilt/innocence phase by striking jurors who, though fair minded, oppose capital punishment.

Michael Whiteman shared these concerns as well. According to Mr. Whiteman, dismissal of a single qualified prospective juror due to his or her opposition to the death penalty should require reversal of any death sentence and a new trial.

During capital trials (as in most trials), judges generally give preliminary instructions explaining the trial process and the jurors' role in it. Jurors also receive instructions or information from the court as the trial proceeds. Additionally, jurors are instructed concerning the law and their duties at the close of evidence, before retiring to consider a verdict and, in capital cases, before the jury's penalty phase deliberations. Several witnesses commented on whether capital case jurors comprehend and are able to follow instructions given by the court.

Professor Bowers submitted a study he wrote with Professor Wanda Foglia. Based on that study, Professor Bowers contended that jurors make premature sentencing decisions at the guilt phase (before penalty phase evidence is presented), that jurors significantly underestimate how long a defendant will serve in prison if not sentenced to death, that jurors frequently do not understand the judge's instructions at the sentencing phase, and that jurors incorrectly believe they must impose a death sentence if certain aggravating factors are present. Furthermore, Professor Bowers contended, many jurors wrongly believe they are not responsible for the ultimate sentencing decision.

[62] 469 U.S. 412 (1985).

15. Appeals and Post-Conviction Proceedings

Professor Bennett Gershman of Pace University Law School expressed concern that appellate rules, such as the "harmless error" doctrine, encourage prosecutors to deliberately engage in prejudicial conduct, in the expectation that an appellate court will overlook the misconduct. Professor Gershman also urged the Legislature to statutorily relax preservation rules, thereby assuring that appellate courts may consider trial errors even when defense counsel failed to register a contemporaneous objection.

Ronald Tabak chairs the Death Penalty Committee of the American Bar Association's Section on Individual Rights and Responsibilities. Mr. Tabak testified on behalf of New York Lawyers Against the Death Penalty. He told the Committees that several reforms are needed to assure that trial, appellate and post-conviction courts can hear valid post-conviction claims. These reforms include: permit only "knowing and voluntary" waivers of issues and claims by trial and appellate counsel; apply appellate decisions retroactively when beneficial to the defendant; and permit successive applications for relief, including successive habeas corpus petitions, in capital cases. Professor Eric Freedman of Hofstra University Law School added that state law should recognize an enforceable right to effective assistance of counsel in all post-conviction proceedings.

Schenectady County District Attorney Robert Carney supports the death penalty in principle, but believes the Legislature should not restore it in New York. District Attorney Carney believes appellate courts use strained legal reasoning to reverse death sentences, and this has the potential to negatively affect both capital and non-capital trial and appellate case law.

District Attorney Carney notes, too, that due to the finality of capital punishment, lawyers defending these cases demand procedural changes, such as the videotaping of confessions, sequential photo arrays and double-blind identification procedures, which most prosecutors oppose. District Attorney Carney believes that momentum for these changes grows with a death penalty in place. Without capital punishment, he said, "the prosecutor's brief against this trend is strengthened."

Bettina Plevan of the Association of the Bar of the City New York noted that New York's death penalty statute does not assure a right to counsel during every phase of a post-conviction proceeding in a death penalty case.[63] Ms. Plevan pointed out that often, post-conviction

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[63] N.Y. JUD. LAW § 35-b provides for the appointment of counsel for accused persons unable to afford counsel in capital cases. Subdivision 12 of section 35-b provides as follows:

> Nothing in this section shall be construed to authorize the appointment of counsel, investigative, expert or other services or the provision of assistance, other than continuing legal education, training and advice, with respect to the filing, litigation, or appeal of a petition for a writ of habeas corpus in any federal court; nor shall anything in this section be construed to authorize the appointment of attorneys, investigative, expert or other services in connection with any proceedings other than trials, including separate sentencing proceedings, of defendants charged with murder in the first degree, appeals from judgments including a sentence of death, and initial motions pursuant to section 440.10 or 440.20 of the criminal procedure law and any appeals therefrom.

proceedings are the forum in which new evidence emerges, particularly evidence of innocence. New York's failure to assure a right to counsel throughout all post conviction phases, she said, puts New York out of compliance with standards of representation developed by the American Bar Association.

Professor Eric Freedman of Hofstra University Law School agreed that New York's laws need to be amended to assure a right to counsel in all post-conviction litigation. According to Professor Freedman, the ABA Guidelines call for representation in capital cases by a team of lawyers and specialists at every stage of the case. But, he said, New York provides only a single lawyer for an initial C.P.L. Article 440 post-conviction motion.

Professor Freedman contended that post-conviction review helps uncover evidence of wrongful convictions and, particularly in capital cases, inappropriate sentences. Relief can be obtained in state collateral review proceedings, federal habeas corpus actions or via executive clemency. Appointed counsel, he said, is needed at each of these stages. Professor Freedman analogized the need for effective counsel in post-conviction proceedings to the holding of the United States Supreme Court in Wiggins v. Smith,[64] in which a death sentence was reversed because of ineffective sentencing representation by Wiggins's capital trial counsel.

16. Conditions on New York's Death Row

New York State's "death row" is known as the "Unit for Condemned Persons" or "UCP". Men on death row are housed at the Clinton Correctional Facility in Dannemora, located fifteen miles south of the Canadian border. No women are on death row in New York. However, a facility for death-sentenced women is maintained at the Bedford Hills Correctional Facility in Westchester County.[65]

Professor Michael Mushlin of Pace University Law School testified before the Committees. In Professor Mushlin's opinion, the conditions on New York's death row are unduly harsh. He described New York's UCP as the most restrictive type of solitary confinement that is possible in a modern penal environment.

According to Professor Mushlin, New York's death row inmates are jailed in nearly complete isolation, locked in individual cells for twenty-three hours each day. All exercise is solitary, one hour or less per day, and occurs in an outdoor caged area regardless of weather conditions. The cells are illuminated 24-hours a day. There is uninterrupted video and audio surveillance.

Professor Mushlin also said that, Dr. Craig Haney, a professor of psychology at the University of California, Santa Cruz, has written that "conditions [such as these] that we know

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[64] 539 U.S. 510 (2003).

[65] *See generally* Assoc. of the Bar of the City of N.Y., Dying Twice: Conditions on New York's Death Row (2001). Professor Michael Mushlin was Chair of the Committee on Corrections of the ASSOC. OF THE BAR OF THE CITY OF N.Y., which jointly engaged in the study of conditions on New York's death row with the Association's Committee on Capital Punishment.

we are likely to lead to cognitive, emotional and behavioral deterioration and . . . result in other forms of potentially disabling psychological harm." Professor Haney continued by testifying that these "conditions can have a 'direct effect on whether or not [a condemned prisoner] will continue to challenge the legal proceedings that led to their death sentence.'"

Professor Mushlin testified that some people sent to death row will not ultimately be executed . He also stated that some "will have their sentences changed or overturned, and will return to the general prison population or society." There are thus practical reasons, Professor Mushlin said, why disabling death row conditions should be avoided.

Professor Robert Blecker believes that prison conditions for "the worst of the worst" should indeed be spartan, even severe. Punishment should not be only about duration, he told the Committees, but also about the quality of life while confined.

When a person is imprisoned for 70 years or LWOP, Professor Blecker said, "life takes on new meaning. There are new joys and satisfactions." He testified that inmates exercise, read, watch television. Small things create new pleasures: new clothing, a toothbrush, snacks, friendship. According to Professor Blecker, many inmates sentenced to lengthy prison terms, including LWOP, are the worst of the worst, and the "worst among them don't deserve" comforts and privileges.

Russell Neufeld has regularly visited a client on death row at the Clinton Correctional Facility. He testified that Professor Blecker's description of less austere death row conditions in some states has no application to death row in New York. The conditions Mr. Neufeld described are similar to those described by Professor Mushlin. The inmates, he said, have no contact with other prisoners, and virtually no human contact. Only recently, Mr. Neufeld testified, has he been permitted to converse with a client directly, rather than shout through a Plexiglas partition.

Mr. Byrne of the Prosecutors Training Institute countered that conditions on New York's death row are neither substandard nor inappropriate and that death row inmates in New York live in a "humane environment" accredited by the American Correctional Association.

17. Execution Process

New York law provides that the punishment of death shall be inflicted by lethal injection, defined as "the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead."[66] Section 659 of the Correction Law provides that the commissioner "shall provide and maintain a suitable and efficient facility, enclosed from public view, within the confines of a designated correctional institution for the imposition of the punishment of death. That facility shall contain the apparatus and equipment necessary for the carrying out of executions by lethal injection."

Pursuant to Correction Law Section 655, the Governor may reprieve the execution of a person sentenced to death. Pursuant to Correction Law section 654, the governor is authorized

[66] N. Y. CORRECT. LAW § 658.

to request the opinion of the attorney general, the district attorney, or the convicted person's counsel as to whether the execution of a person should be reprieved or suspended.

A few witnesses testified concerning the effects of execution on family members and others who interact with the condemned man or woman.

Robert Meeropol was born Robert Rosenberg. His parents were Ethel and Julius Rosenberg. The Rosenbergs were convicted of conspiracy to commit espionage and were executed at New York's Sing Sing Prison in 1953.

Robert Meeropol (who changed his name when he was adopted) was six years old when his parents were executed. Mr. Meeropol's testimony focused on the impact an execution has on the defendant's children. Mr. Meeropol grew up with a general sense of anxiety. He survived due to a supportive community and adoptive family. Nationally, Mr. Meeropol said, little attention is paid to the children of condemned persons. Mr. Meeropol opposed the death penalty and urged legislators to consider the impact on the children of condemned persons before enacting any death penalty legislation.

Bill Babbitt discovered evidence that his brother Manny was responsible for the death of a woman, Leah Schendel. According to Mr. Babbitt, Manny Babbitt suffered from post-traumatic stress disorder caused by his service in the Vietnam conflict. Bill Babbitt testified that he informed Sacramento Police, and advised the police that his brother suffered from a mental illness. Bill Babbitt says he was assured his brother would receive mental health treatment.

Manny Babbitt was apprehended, but Bill Babbitt was surprised when the District Attorney announced that he would be seeking the death penalty. Manny Babbitt was convicted and subsequently executed by the State of California. Bill Babbitt testified that he knows the community is a safer place with his brother off the streets, but, "I feel that I have my brother's blood on my hands."

Although his brother was not executed, David Kaczynski of New Yorkers Against the Death Penalty told of a similar experience. David Kaczynski is the brother of Ted Kaczynski, known as the "Unabomber". Mr. Kaczynski and his wife provided information to the FBI, which led to the arrest and eventual conviction of Ted Kaczynski. David Kaczynski testified that after his brother was arrested, he was shocked to discover that the Justice Department intended to seek the death penalty. "[I]it didn't seem to concern prosecutors," David Kaczynski testified, "that my brother was mentally ill with schizophrenia, or that executing him would discourage other families from following our example in the future." Ted Kaczynski is now serving a life sentence in federal prison.

Bianca Jagger, a member of the Leadership Council of Amnesty International, USA, witnessed the Texas execution of Gary Graham. Mr. Graham, she said, was sentenced to death based on the testimony of one eyewitness, and maintained his innocence up to and including the moment of his execution. "It is difficult to describe my horror at witnessing his death," she told the Committees. "I could see Gary Graham was tied to a hospital trolley and about to be killed. It reminded me of a modern day cross and I was there to witness the execution of a man I believe

to be innocent. I was in a state of disarray and I was revolted and terrified at the thought of witnessing another human being killed."

As noted earlier, Stephen Dalsheim worked for the New York State Department of Correctional Services for 42 years, the last 20 as superintendent in charge of various prison facilities. Superintendent Dalsheim was responsible for many inmates sentenced to death, and was in charge of Sing Sing prison during numerous executions.

Superintendent Dalsheim testified that executions had a palpable effect on staff at the "death house". Many of the officers who guarded death row drank excessively. Superintendent Dalsheim recalled one officer, who was in charge of the unit for condemned men and in charge of the procedures for carrying out executions. The officer took his job seriously, but also talked about having to kill people. He also told Superintendent Dalsheim that he was "never quite sure whether the person he was killing was guilty or innocent."

18. Proposed Legislative Amendments to the Death Penalty Law

Several witnesses offered recommendations concerning legislation to address the LaValle decision, including Governor's program legislation passed by the Senate in 2004 and 2005.[67]

The legislation passed by the Senate is designed to address the LaValle decision in three ways. First, the bill would provide that, after finding a defendant guilty of murder in the first degree, jurors would be instructed that they must by unanimous vote determine one of three penalty phase options: death, LWOP, or life imprisonment with a minimum term of at least twenty and up to twenty-five years. Second, the jurors would be instructed that if they fail to unanimously agree on one of these three sentences, the judge would sentence the defendant to life imprisonment without parole.

Third, this legislation seeks to apply these new procedures not only to future cases, but also retroactively "to crimes committed prior to . . . the effective date" of the new law.[68]

Comments on Senate Bill # 7720 (2004)/ Senate Bill # 2727 (2005)

Sean Byrne of the NY Prosecutors Training Institute contended that S. 7720/S. 2727 would correct the problem identified by the Court in LaValle, and that the correction could be applied retroactively as proposed by the bill. Mr. Byrne argued that applying the new law to older cases, including those committed after LaValle but before enactment of the new legislation, would not violate the federal prohibition against *ex post facto* laws, even though the deadlock

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[67] Governor's Program Bill No. 78, S. 7720 (Volker, *et al.*) was introduced in the Senate on August 9, 2004, and passed by the Senate on August 11, 2004. The bill was reintroduced during the 2005 legislative session on February 25, 2005 and passed by the Senate on March 9, 2005. (Governor's Program Bill No. 27, S. 2727 (Volker, *et al.*). Assembly Bill 1452 (Nesbitt, *et al.*) contains nearly identical provisions. As noted earlier, Assemblyman Robin Schimminger has also introduced legislation that would enact similar amendments to address the LaValle decision and also make other changes to the death penalty law (A. 5523; A. 5524; A. 5525).

[68] *See* S. 7720, § 5; S. 2727, § 5.

sentence would be retroactively elevated, from a parole-eligible sentence of 20-25 years-to-life, to a sentence of life imprisonment without parole.

Mr. Byrne expressed confidence that these changes could constitutionally be applied retroactively because the changes are "ameliorative" and procedural (presumably, to correct the coercive nature of the present instruction). Professor Blecker agreed, "[b]ased on no well-developed expertise in retroactivity," that retroactive application of the Senate bill appears to be constitutional under the decision of the U.S. Supreme Court in Dobbert v. Florida,[69]

While Mr. Byrne supported the Senate-passed legislation, he also advocated an alternative approach:

> [W]ith respect to first degree murders committed prior to the effective date of the corrective legislation, the deadlock charge should be amended to require that the court must charge the jury to determine whether the defendant should be sentenced to death, to life imprisonment without parole, or to an indeterminate term of imprisonment with a minimum term to be determined by the court, of between 20 and 25 years, and a maximum term of life. If the jury is unable to reach a unanimous verdict, the court must sentence the defendant to the indeterminate term, with a minimum between 20 and 25 years, and a maximum of life.[70]

Mr. Byrne went on to suggest that first degree murders committed after the effective date of the legislation should be treated differently. For these future cases, he said:

> [T]he deadlock charge statute should be amended to require that the court charge the jury to determine whether the defendant should be sentenced to death, or to life imprisonment without parole. If the jury is unable to reach a unanimous verdict [between these two options], the court must sentence the defendant to life imprisonment without parole.

Professor James Acker of the State University of New York at Albany expressed concern about the type of legislative changes discussed above. Professor Acker said any legislation that would give jurors only two options (death or LWOP) but judges three options (death, LWOP and 20-25 years to life) would be constitutionally suspect because, he said, prosecutors would be empowered to eliminate the opportunity for a parole eligible-sentence by filing a death notice.

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[69] 432 U.S. 282 (1977).

[70] The deadlock instruction under this formulation is the same as the instruction struck down by the Court of Appeals in the LaValle decision. Mr. Byrne added, however, (in an apparent effort to address the coercive effect of the required deadlock instruction as found by the Court in LaValle) that, with respect to first degree murders committed before enactment of the new legislation, jurors should be instructed that they could consider, as a mitigating factor, that the defendant would not pose a risk if released in the future. In response to questioning, Mr. Byrne also said he believed a defendant could be permitted to waive this instruction, (if, for example, the defense concluded it might be prejudicial to raise the question of future dangerousness before the jury).

Professor Acker questioned whether constitutional principles of due process, equal protection and separation of powers would permit legislation that allows the prosecutor to unilaterally deny eligibility for possible, eventual release.

Professor Acker posited that giving three options to the penalty phase jury (death, LWOP and 20 to 25 years to life imprisonment) with LWOP on deadlock would be flawed as well. If a deliberating jury rejects death and, in its penalty phase vote, splits eleven to one in favor of a 20-25 years-to-life sentence, he asked, why should a deadlock sentence of LWOP (which was opposed by 11 of 12 jurors) be statutorily required? According to Professor Acker, "this proposed solution to jury deadlocks appears to be unprecedented in other state death penalty legislation that includes three sentencing options."

Finally, Jonathan Zimet provided a memorandum in which he reviews several approaches the Legislature could take in an attempt to address the LaValle ruling.[71] Mr. Zimet analyzed a variety of options but he made no specific recommendation. Mr. Zimet did conclude, however, that retroactively elevating the deadlock/ default sentence (for crimes committed before enactment of any amendatory legislation) from the previous deadlock sentence of 20 to 25 years to life, to a new deadlock sentence of LWOP, "would likely be invalidated under the Ex Post Facto clauses of the federal constitution."[72]

[71] Mr. Zimet emphasized in a footnote that "the views and opinions expressed [in the memorandum] are solely those of the author . . . ."

[72] This retroactive approach is proposed in the Governor's program legislation passed by the Senate discussed earlier. In testimony before the Committees, Monroe County D.A. Michael Green also expressed concerns about the validity of this retroactive approach.

Appendix

ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON JUDICIARY AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION

HEARING ON THE DEATH PENALTY WITNESS LIST
(Persons Who Actually Testified)

#1

NEW YORK CITY
WEDNESDAY, DECEMBER 15, 2004
10:00AM
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
MEETING HALL, 42 WEST 44TH STREET

1. Hon. Robert Morgenthau
   District Attorney, New York County

2. Robert Blecker, Esq.
   Professor, New York Law School

3. **Panel**
   Barry Scheck, Esq., Co-Director
   Innocence Project

   Thomas Sullivan, Esq. (Ryan Commission)
   Jenner & Block

   Russell Neufeld, Esq.
   Defense Attorney

   Juan Melendez

   Madison Hobley

4. **Panel (Family members of murder victims)**
   Joan Truman-Smith

   Bill Pelke
   Murder Victims Families for Human Rights

5. **Panel (Family members of murder victims)**
Kate Lowenstein
Murder Victims Families for Reconciliation

Patricia J. Perry

Bill Babbitt

6. **Panel**
Howard Hohne

Ernest Shujaa Graham
Campaign to End the Death Penalty

7. **Panel**
David Baldus, Esq.
Professor of Law, University of Iowa College of Law

Eric Freedman, Esq.
Hofstra University

Isaiah Skip Gant, Esq.
Federal Death Penalty Resource Counsel

8. **Panel**
Jennifer Cunningham, Esq.
Executive Vice President, 1199 SEIU Service Employees Int'l Union

9. **Panel**
Christina Swarns, Esq.
NAACP Legal Defense Fund

S. Jean Smith, Esq.
The Cherish Life Circle

Sister Camille D'Arienzo, Co-Founder
The Cherish Life Circle, Brooklyn

Rev. N.J. (Skip) L'Heureux Jr., Executive Director
Queens Federation of Churches

Michael Kendall
Arch Deacon, Episcopal Diocese of New York
Vice President of the Counsel of Churches in New York City

Dr. James Fitzgerald
Minister for Social Justice at the Riverside Church in New York City

10. Bishop Dominick Lagonegro
Archdiocese of New York
NYS Catholic Conference Chaplains Apostle Committee

11. Andrew Cuomo, Esq.

#2

NEW YORK CITY
FRIDAY, JANUARY 21, 2005
10:00AM
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
MEETING HALL, 42 WEST 44TH STREET

1. Bettina Plevan
President, Association of the Bar of the City of New York

Jeffrey Kirchmer
Association of the Bar of the City of New York

3. Michael Palladino
President, Detectives' Endowment Association, Inc.

4. Lou Matarazzo
Former President, Police Benevolent Association

5. **Panel**
Pat Webdale
Mother of murder victim

Carol Lee Brooks
Parents of Murdered Children, Queens

4. **Panel**
Ron Stalling
Retired officer, uniformed division of U.S. Secret Service

Anthony Miranda
Retired Sergeant, NYPD

Marsha Lee Watson
President, Guardians Association of State Correctional Officers

Randy Jurgenson
Retired homicide detective, NYPD

Rabbi Marc Gruber
Reform Jewish Voice of NYS

5. **Panel**
Robert Walker
Brethren

6. **Panel**
Colleen Brady
Legal Aid Society (NYC)

William Hellerstein
Professor, Brooklyn Law School

Jeffrey Fagan
Professor, Columbia University

Ursula Bentele
Professor, Brooklyn Law School

James S. Liebman
Professor, Columbia University School of law

7. **Panel**
Rev. Thomas W. Goodhue, Executive Director
The Long Island Council of Churches

Rev. Chloe Breyer
Associate Minister, St. Mary's Episcopal Church

Jim Morgan
Convenor, Virgil to End the Death Penalty, Brooklyn

Hal Weiner
Convenor, St. Saviour Chapter Episcopal Peace Fellowship

Evelyn Wyfka
Sister to Sister, Human Rights

8. **Panel**
Ron Honberg
Legal Director, National Alliance for the Mentally Ill

Dr. Xavier Amador
Columbia University

9. **Panel**
Bennett Gershman
Professor, Pace University Law School

Michael Mushlin
Professor, Pace University Law School

Evan Mandery
Assistant Professor, John Jay College of Criminal Justice

10. **Panel**
Sundiata Sadiq
1st Vice President, NAACP, Ossining Chapter

Robert Perry,
Legislative Director, New York Civil Liberties Union

Dr. William Schultz
Executive Director, Amnesty International USA

Edward Rodriguez
Associate Professor, Seton Hall University

11. **Panel**
Dorit Radzin
Advocacy Associate, Human Rights Watch

Delphine Selles
Campaign to End the Death Penalty

12. **Panel**
Claire Laura Hogenauer
Attorney-at-Law

Christine Japely
Assistant Professor, Norfolk Community College, CT

#3

ALBANY
TUESDAY, JANUARY 25, 2005
10:00AM
ROOSEVELT HEARING ROOM, ROOM C, 2ND FLOOR
LEGISLATIVE OFFICE BUILDING

1. **Panel**
   William J. Fitzpatrick
   Onondaga County District Attorney

2. Bishop Howard J. Hubbard
   Roman Catholic Bishop of Albany, NYS Catholic Conference

3. **Panel**
   Gerald Kogan
   Retired Chief Justice, Florida Supreme Court

   Stewart Hancock
   Retired Justice, New York State Court of Appeals

   David Kaczynski
   New Yorkers Against the Death Penalty

   James R. Acker
   Professor, School of Criminal Justice, SUNY at Albany

4. **Panel**
   Debra Jaeger
   Sister of murder victim

   Russell Murphy
   Professor, Suffolk University School of Law

5. **Panel**
   Janice Grieshaber
   Bruce Grieshaber
   Parents of murder victim

6. Michael C. Green
   Monroe County District Attorney

7. Bishop Jack M. McKelvey
   Episcopal Diocese of Rochester

8. Bill Kurtis
   Court-TV/ Author

9. Richard J. Bartlett
   Former member, New York State Assembly
   Former chair, New York State Penal Law Revision Commission

10. **Panel**
Jeffrey Blake

Robert McLaughlin

Stephen Saloom
Policy Director, Innocence Project, NY

11. **Panel**
Dick Dieter
Death Penalty Information Center

Kathryn M. Kase
Texas Defender Association

12. **Panel**
Marguerite Marsh
Family member of murder victim

Robert Brignola

Diane-Marie Frappier

13. **Panel**
John Blume
Cornell University Law School

Steve Garvey
Cornell University Law School

Sherri Johnson
Cornell University Law School

Samuel J. M. Donnelly
Professor, Syracuse University School of Law

14. **Panel**
Ruth S. Klepper
Executive Director, Interfaith Impact of NYS

Anzetta Adams
Baptist Ministers Conference of Greater New York

Linda Chidsey
Clerk of Yearly Meeting, New York Religious Society of Friends

Sonia Ivette Dueno
Coordinator, Racial Economic & Gender Justice Fellowship Reconciliation

Tim Taylor
Brethren

James Taylor III
Brethren

#4

ALBANY
TUESDAY, FEBRUARY 8, 2005
11:00AM
ROOSEVELT HEARING ROOM, ROOM C, 2ND FLOOR
LEGISLATIVE OFFICE BUILDING

1. Robert Carney
   District Attorney, Schenectady County

2. Sean M. Byrne
   Executive Director, New York Prosecutors Training Institute

3. **Panel**
   Michael Whiteman
   Former Counsel to Governors Nelson Rockefeller and Malcolm Wilson

   John Dunne
   Former New York State Senator
   Former Assistant Attorney General in Charge, Civil Rights Division,
   U.S .Department of Justice

4. **Panel**
   Cheryl Coleman
   Former Albany County Assistant District Attorney/ Former Albany City Court Judge

   Bud Welch
   Father of Oklahoma City bombing victim

   Robert Meerpol
   Rosenberg Fund for Children

   Jonathan E. Gradess
   New York State Defenders Association

5. **Panel**
   John Restivo

   Sammie Thomas

   Scott Christianson
   Author

   Nina Morrison, Innocence Project, New York City

6. **Panel**
   Gary Abramson
   Legal Aid Society of Orange County

   Professor William Bowers
   Capital Jury Project, Northeastern University

   Marsha Weissman
   Executive Director, Center for Community Alternatives

7. George Kendall
Holland & Knight

8. **Panel**
Raymond A. Kelly, Jr,
New York State Association of Criminal Defense Lawyers

Ronald Tabak
NY Lawyers Against the Death Penalty

Ann M. Brandon
Chair, Capital Punishment Study Committee, New York League of Women Voters

9. **Panel**
Rev. Daniel B. Hahn
Director, Lutheran Statewide Advocacy

Reverend Geoffrey Black
President, NYS Council of Churches

Barbara Zaron, Arleen Urell
Members, Steering Committee, Reform Jewish Voice of New York State

10. Barbara Barry
Tompkins County Coalition Against the Death Penalty

11. **Panel**
Dominic Candido
Clerk, Matinecock Monthly Meeting, Religious Society of Friends (Quakers)

Lee Haring
Religious Society of Friends, Oswego

Anita Paul
Schenectady Friends Meeting

12. **Panel**
Rev. John Marsh
Unitarian Universalists for Alternatives to the Death Penalty

Wanda Goldstein
Chair, Restorative Justice Group, Unitarian Universalists Congregation, Kingston

#5

NEW YORK CITY
FRIDAY, FEBRUARY 11, 2005
10:00AM

PACE UNIVERSITY
MICHAEL SCHIMMEL CENTER FOR THE ARTS
3 SPRUCE STREET
(BETWEEN PARK ROW AND GOLD STREET)
NEW YORK, NEW YORK

1. **Panel**
   Catherine Abate
   Former New York State Senator
   Former Commissioner, NYC Departments of Correction and Probation
   Former Chair, NYS Crime Victims Board

   Bianca Jagger
   Goodwill Ambassador for the Fight Against the Death Penalty, Council of Europe

   Stephen Dalsheim
   Superintendent (ret.), Sing Sing and Downstate Correctional Facilities

   Charles Billups
   Chairman, Grand Council of Guardians

2. Mark Green
   Former NYC Public Advocate
   President, New Democracy Project

3. **Panel**
   Myron Beldock
   Lawyer for Yusef Salaam

   Yusef Salaam

   Sharonne Salaam

   Karey Wise

   George Goltzer
   Board of Directors, NYS Association of Criminal Defense Lawyers

4. **Panel**
   Rabbi Shlomo Blickstein

   William Mordhorst

5. John Payne
   President, NYS Chapter Democrats for Life

6. **Panel**
Barbara Bernstein
Executive Director, New York Civil Liberties Union, Nassau County Chapter

Kenneth Diamondstone
Vice Chair Central Brooklyn Independent Democrats

7. Bell Gale Chevigny
Professor Emerita, Purchase College

8. **Panel**
Queen Mother Dr. Delois Blakely
Community Mayor of Harlem, President New Foundation
Harlem Women National Chairperson

Liliana Segura
Campaign to End the Death Penalty

Leonara Wengraf
Campaign to End the Death Penalty

9. **Panel**
Frederic Pratt
Legal Aid Society Capital Division

James Rogers
President, Association of Legal Aid Attorneys

10. Lawrence C. Moss

11. Darryl King

12. Linda Guillebeaux

THE FOLLOWING PERSONS DID NOT TESTIFY IN PERSON BUT SUBMITTED WRITTEN TESTIMONY TO THE COMMITTEES:

1. Robert K. Corliss
   Associate Director for Criminal Justice, National Alliance for the Mentally Ill of New York State (NAMI NYS)

2. Rudy Cypser (letter statement)
   CURE-NY

3. Louise de Leeuw
   Poughkeepsie Monthly Meeting of the Religious Society of Friends

4. Jose A. Garcia
   Policy Analysis and Advocacy Coordinator
   Puerto Rican Legal Defense and Education Fund (PRLDEF)

5. Alice Green, Ph.D.
   Executive Director, Center for Law and Justice, Inc.

6. Samuel R. Gross
   Professor of Law, University of Michigan

7. Jeff Frayler, President, New York State Association of PBAs, Inc.

8. Richard Harcrow
   President, New York State Correctional Officers and Police Benevolent Association, Inc.

9. Evan Kelley
   Capital Punishment Seminar, Fall 2004

10. Charles S. Lanier, Ph.D.
    Co-Director, Capital Punishment Research Initiative (CPRI), University of Albany

11. Alexander Lesyk, Esq.
    Northern Franklin County Public Defender

12. Karen E. Mallam
    Poughkeepsie Monthly Meeting of the Religious Society of Friends

13. Carolyn McCarthy (letter statement)
    United States House of Representatives

14. Roy Neville
    Board of Directors, National Alliance for the Mentally Ill (NAMI-New York State)

15. Lillian Roberts
Director of New York City – District Council 37

16. Lillian Rodriguez-Lopez
Hispanic Federation

17. George Rosquist
Executive Director, Freedom NOW, New York City

18. Ajamu K. Sankofa, Esq.
Executive Director, New York City Chapter of Physicians for Social Responsibility (NYC/PSR)

19. Reverend James Coy Sheehan
Roman Catholic Priest, Archdiocese of New York

20. Stephen Singer
Co-Chair, Criminal Courts Committee, Queens County Bar Association

21. Scott Turow, Esq.
Attorney, Writer

22. Eugene G. Wanger
Co-Chair, Michigan Committee Against Capital Punishment

23. Women's Bar Association of the State of New York (WBASNY)
Statement Regarding New York's Death Penalty

24. Jonathan D. Zimet, Esq.

ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON THE JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION

NOTICE OF JOINT PUBLIC HEARING

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

NEW YORK CITY	ALBANY
Wednesday, December 15, 2004	**Tuesday, January 25, 2005**
10:00 a.m.	**10:00 a.m.**
Association of the Bar of the City of New York	**Roosevelt Hearing Room**
Meeting Hall, 42 West 44th Street	**Room C, 2nd Floor**
	Legislative Office Building

***Additional hearing dates and locations may be scheduled if sufficient interest exists and will be announced in a subsequent public hearing notice.**

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.

On June 24th, 2004, the New York Court of Appeals in People v. LaValle invalidated the deadlock instruction provision of New York's death penalty law, holding that the instruction created a "substantial risk of coercing jurors into sentencing a defendant to death" in violation of the Due Process clause of the New York State Constitution. The Court also held that the absence of any deadlock instruction would be constitutionally impermissible and that the Court was not judicially empowered to create a new deadlock instruction. The Court thus found that "under the present statute, the death penalty may not be imposed" under New York law, but that first degree murder prosecutions could continue to go forward as non-capital cases under the current statute. As noted above, New York's current first degree murder law authorizes a sentence of life imprisonment without parole to be imposed in any case.

The jury deadlock instruction was first proposed by Governor Pataki in program legislation which was passed by the Senate prior to the final legislative agreement on the death penalty. (See S-2649 of 1995). The Governor's deadlock instruction proposal was later included in the final death penalty law enacted by the Legislature on March 7th, 1995.

New York's death penalty law was in effect for slightly less than nine years before it was struck down this past June. In that time, it is estimated that the state and local governments have spent approximately $170 million administering the statute. Not a single person has been executed in New York since the law's enactment. Seven persons have been sentenced to death. Of these:

- the first four sentences to reach the Court of Appeals were struck down on various grounds;
- an additional sentence was converted to a sentence of life imprisonment without parole after the LaValle decision; and
- two death sentences are awaiting review.

New York's death penalty statute has remained highly controversial since its enactment and continues to be roundly criticized. The question of whether the statute should now be revived and, if so, in what form, has also been the subject of intense interest and debate since the Court of Appeals decision in LaValle.

These hearings are intended to provide a public forum to review what New York's experience with the death penalty over the past nine years has been and what that experience has taught us. It is intended to solicit views on how the experience of other states, the federal government and other nations can help inform New York's actions on this issue. Finally, the hearings are intended to foster a public dialogue on the ultimate question of whether New York's death penalty law should be reinstated and, if so, what form any new law should take.

November 22, 2004

Joseph R. Lentol	**Helene E. Weinstein**	**Jeffrion L. Aubry**
Member of Assembly **Chair** **Committee on Codes**	**Member of Assembly** **Chair** **Committee on the Judiciary**	**Member of Assembly** **Chair** **Committee on Correction**

Note:

Persons wishing to present pertinent testimony to the Committees at the joint public hearings should complete and return the enclosed reply form as soon as possible. It is important that the reply form be fully completed and returned so that persons may be notified in the event of emergency postponement or cancellation.

Oral testimony will be limited to ten (10) minutes' duration and will be by invitation only. In preparing the order of witnesses, the Committees will attempt to accommodate individual requests to speak at particular times in view of special circumstances. These requests should be made on the attached reply form or communicated to the Committees' staff as early as possible.

Thirty (30) copies of any prepared testimony should be submitted at the hearing registration desk.

The Committees would appreciate advance receipt of prepared statements.

In order to further publicize these hearings, please inform interested parties and organizations of the Committees' interest in receiving testimony from all sources.

In order to meet the needs of those who may have a disability, the Assembly, in accordance with its policy of non-discrimination on the basis of disability, as well as the 1990 Americans with Disabilities Act (ADA), has made its facilities and services available to all individuals with disabilities. For individuals with disabilities, accommodations will be provided, upon reasonable request, to afford such individuals access and admission to Assembly facilities and activities.

SELECT QUESTIONS TO WHICH WITNESSES MAY DIRECT THEIR TESTIMONY:

I. Should the Death Penalty be Reinstated in New York?

1. Is it possible to design a death penalty law which is fairly administered and consistently applied, free from impermissible racial, ethnic or geographic bias and prevents the conviction of the innocent?

2. Is the death penalty an appropriate societal exercise of retribution against persons who commit intentional murder?

3. What evidence is there that New York's death penalty or the death penalty in general deters intentional murder more effectively than other sentencing options?

4. Are the results which New York has achieved over the past nine years in administering the death penalty worth the significant public resources which have been expended? Could those resources have been used more effectively for other crime control or public purposes?

5. Is the currently available sentence of life imprisonment without the possibility of parole an effective alternative to the death penalty in New York? Or is it imperative that this current sentencing option be supplemented with the death penalty?

6. What do the trends and experiences of other states and nations which have considered or implemented the death penalty or life imprisonment without parole teach us about whether capital punishment should be reinstated in New York?

II. If the Death Penalty in New York Were Reinstated, What Should it Provide for?

1. Did the 1995 statute provide appropriate safeguards to ensure that innocent persons would not be convicted and subject to the death penalty in New York? If not, what additional safeguards would be needed to meet that goal?

2. Have the close family members and loved ones of deceased murder victims been given appropriate input and involvement in decisions about seeking the death penalty and in the death penalty process under the 1995 law? How could the role of these family members and loved ones be improved?

3. Did the 1995 statute provide appropriate protections against convictions and the imposition of the death penalty by virtue of bias applicable to the race or ethnicity of death penalty defendants or murder victims? If not, what additional steps would be necessary to achieve that goal?

4. As noted above, New York's death penalty law, as amended, provided a death penalty option for thirteen kinds of intentional murder. Should those categories be expanded, contracted or otherwise modified if the death penalty is reinstated?

5. New York's law provided a system of capital defense through a Capital Defender Office and contracts with other institutional defenders and private attorneys. Has this system worked effectively? How might it be improved?

6. Under New York's death penalty law, prosecutors were given unfettered discretion to seek or not seek the death penalty in any first degree murder case. Is such unlimited discretion appropriate? Did this system of prosecutorial discretion work effectively and fairly?

7. Three death sentences imposed under the 1995 law came from Suffolk County with one each coming from Kings, Queens, Onondaga and Monroe counties. The chances that a defendant would be subject to a death penalty prosecution in New York over the past nine years varied widely, depending upon the county in which a defendant's crime occurred. Is this a permissible result in a death penalty system? Should the imposition of the death penalty vary, depending upon the county in which a defendant is prosecuted?

8. Has the state provided sufficient financial resources to law enforcement, victims' services, defense providers and the judicial system to administer the death penalty over the past nine years? What changes in state funding for administering the death penalty could be considered?

9. What do the experiences of other states with death penalty laws and the federal government teach us about how any death penalty statute should be structured in this state?

10. What changes in evidentiary rules or the appellate process might be considered if the 1995 law were reinstated?

11. On August 11th of this year, the Senate passed Governor's program legislation which seeks to remedy the unconstitutional jury deadlock instruction identified by the Court of Appeals in the LaValle decision (S-7720). The bill would seek not only to reinstate the death penalty for future cases, but would also purport to retroactively apply the new statute, both to crimes which occurred prior to the LaValle decision and crimes which occurred subsequent to LaValle but prior to the law's enactment, during a time period when no valid death penalty law was in effect in New York. The bill's retroactive provisions have been criticized as being violative of the *Ex Post Facto* clause of the United States Constitution and therefore invalid, particularly with respect to cases occurring subsequent to LaValle.

(a) Should the prospective provisions of S-7720, which seek to reinstate the death penalty be adopted without any further modifications to the statute?

(b) Are the retroactive provisions of S-7720 which seek to reinstate the death penalty with respect to prior crimes constitutionally valid? Should these provisions be adopted?

12. The 1995 statute generally barred the execution of mentally retarded persons but contained an exception for the first degree murder of a corrections officer committed by a prison or jail inmate. The United States Supreme Court, in its 2002 decision in Atkins v. Virginia, barred the execution of mentally retarded persons. How does the Atkins holding impact the '95 law's limited provisions authorizing the execution of mentally retarded persons?

13. The 1995 statute contained extensive provisions related to a jury's consideration of a defendant's possible mental impairment when determining whether the death penalty should be imposed. How well did these provisions operate? Would these provisions need to be revised if the death penalty in New York were reinstated?

14. The 1995 law set 18 as the minimum age for the imposition of the death penalty. Should that minimum age be modified if the death penalty is reinstated?

15. The 1995 law contained provisions for disqualifying jurors from death penalty guilt and penalty phase proceedings who harbored opinions for or against the death penalty which would preclude them from rendering an impartial verdict or exercising their discretion to determine an appropriate sentence. Has this provision, as it has been interpreted by New York's courts, been applied fairly and appropriately? Should this provision be modified in the event the death penalty is reinstated?

16. The 1995 statute established procedures for housing death sentenced inmates and carrying out death sentences. The State Department of Correctional Services has also implemented a number of policies in administering the 1995 law. Should any of these laws or policies be changed, in the event the death penalty is reinstated?

PUBLIC HEARING REPLY FORM

Persons wishing to present testimony at the joint public hearing on "The Death Penalty in New York" are requested to complete this reply form as soon as possible and mail, email or fax it to:

Seth H. Agata, Counsel
Assembly Committee on Codes
Room 508 – The Capitol
Albany, New York 12248
Email: agatas@assembly.state.ny.us
Phone: (518) 455-4313
Fax: (518) 455-4682

☐ I plan to attend the joint public hearing on "The Death Penalty in New York" to be conducted by the Assembly Committees on Codes, the Judiciary and Correction in New York City on December 15, 2004.

☐ I plan to attend the joint public hearing on "The Death Penalty in New York" to be conducted by the Assembly Committees on Codes, the Judiciary and Correction in Albany on January 25, 2005.

☐ I would like to make a public statement at the joint hearing in ___ NYC or ___ Albany. My statement will be limited to ten (10) minutes, and I will answer any questions which may arise. I will provide thirty (30) copies of my prepared statement.

☐ I will address my remarks to the following subjects:

_____

_____

☐ I do not plan to attend either of the above hearings.

☐ I would like to be added to the Committees' mailing lists for notices and reports.

☐ I would like to be removed from the Committees' mailing lists.

☐ I will require assistance and/or handicapped accessibility information.

Please specify the type of assistance required:

_____

_____

IF YOU PLAN TO ATTEND, YOU MUST BRING A FORM OF PHOTO IDENTIFICATION

NAME: _____

TITLE: _____

ORGANIZATION: _____

ADDRESS: _____

E-MAIL: _____

TELEPHONE: _____

FAX TELEPHONE: _____

ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON THE JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION

NOTICE OF JOINT PUBLIC HEARING

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

NEW YORK CITY

Friday, January 21, 2005
10:00 a.m.
Association of the Bar of the City
of New York
Meeting Hall, 42 West 44th Street

SPECIAL NOTE: This is an additional hearing date for the Assembly's hearings on the Death Penalty in New York. One previous hearing was held on the subject on December 15th, 2004 in New York City. An additional hearing will also be held in Albany on January 25th, 2005. Both of these hearing dates were announced in a previous hearing notice.

The Assembly has scheduled this additional New York City hearing because of the large number of people who have asked to testify at these hearings. The subject, purpose, questions and hearing procedures outlined below for the January 21st hearing are identical to those previously announced for the December 15th and January 25th hearings.

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.

ASSEMBLY STANDING COMMITTEE ON CODES,
ASSEMBLY STANDING COMMITTEE ON JUDICIARY
AND
ASSEMBLY STANDING COMMITTEE ON CORRECTION

NOTICE OF JOINT PUBLIC HEARING
ORAL TESTIMONY BY INVITATION ONLY

SUBJECT: The Death Penalty in New York

PURPOSE: To examine the future of capital punishment in New York State.

ALBANY	NEW YORK CITY
Tuesday, February 8, 2004	**Friday, February 11, 2005**
11:00 a.m.	**10:00 a.m.**
Roosevelt Hearing Room	**Pace University**
Room C, 2nd Floor	**Michael Schimmel Center for the Arts**
Legislative Office Building	**3 Spruce Street**
	(between Park Row and Gold Street)
	New York, New York

***These two hearings are a continuation of the New York City and Albany hearings previously held on December 15th, January 21st and January 25th and are being scheduled to allow persons who previously asked to testify at the earlier hearings and were not able to testify due to time constraints to present testimony to the committees. Oral testimony will be by invitation only.**

New York's most recent death penalty statute was enacted by the Legislature on March 7th, 1995 and became effective on September 1st of that year. The statute, as amended, provided for the imposition of the death penalty, life imprisonment without parole or life imprisonment with the possibility of parole for thirteen specific categories of intentional murder, created judicial procedures for imposing and reviewing death sentences, established a system of public defense for indigent death penalty defendants and implemented correctional system procedures for housing death row inmates and imposing death sentences.

EXHIBIT 3

Bills 2006-2007

S171/2471 Scs (SCS) Eliminates the death penalty and replaces it with life imprisonment without eligibility for parole in certain circumstances.
*

Bills and Joint Resolutions Signed by the Governor

Identical Bill Number: A3716
A795 (ACS)

Lesniak, Raymond J. as Primary Sponsor
Martin, Robert J. as Primary Sponsor
Turner, Shirley K. as Primary Sponsor
Gill, Nia H. Esq as Primary Sponsor
Caraballo, Wilfredo as Primary Sponsor
Bateman, Christopher as Primary Sponsor
Johnson, Gordon M. as Primary Sponsor
Vainieri Huttle, Valerie as Primary Sponsor
Cruz-Perez, Nilsa as Primary Sponsor
Weinberg, Loretta as Co-Sponsor
Cryan, Joseph as Co-Sponsor
Jasey, Mila M. as Co-Sponsor
Evans, Elease as Co-Sponsor
Watson Coleman, Bonnie as Co-Sponsor
Conners, Jack as Co-Sponsor
Oliver, Sheila Y. as Co-Sponsor
Quigley, Joan M. as Co-Sponsor
Scalera, Frederick as Co-Sponsor
Barnes, Peter J., III as Co-Sponsor
Voss, Joan M. as Co-Sponsor
Giblin, Thomas P. as Co-Sponsor
Schaer, Gary S. as Co-Sponsor
Gusciora, Reed as Co-Sponsor
Prieto, Vincent as Co-Sponsor
McKeon, John F. as Co-Sponsor
Egan, Joseph V. as Co-Sponsor
Payne, William D. as Co-Sponsor

1/10/2006 Introduced in the Senate, Referred to Senate Judiciary Committee
5/10/2007 Reported from Senate Committee as a Substitute, 2nd Reading
5/14/2007 Referred to Senate Budget and Appropriations Committee
12/3/2007 Reported from Senate Committee, 2nd Reading
12/10/2007 Motion To Sa (Lance)
12/10/2007 Motion To Table (20-14) (Kenny)
12/10/2007 Passed by the Senate (21-16)
12/10/2007 Received in the Assembly without Reference, 2nd Reading
12/13/2007 Substituted for A3716/795 (ACS)
12/13/2007 Motion To Aa (Karrow)
12/13/2007 Motion To Table (Watson Coleman) (43-31-0)
12/13/2007 Passed Assembly (Passed Both Houses) (44-36-0)
12/17/2007 Approved P.L.2007, c.204.

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Introduced - 10 pages PDF Format HTML Format
Statement - SJU 5/10/07 S2471 SCS - 3 pages PDF Format HTML Format
Fiscal Estimate - 11/29/07; SCS S2471 - 7 pages PDF Format HTML Format
Statement - SBA 12/3/07 S2471 SCS - 5 pages PDF Format HTML Format
Senate Committee Substitute - S2471 - 13 pages PDF Format HTML Format
Advance Law - 12 pages PDF Format HTML Format
Pamphlet Law - 6 pages PDF Format HTML Format

Committee Voting:
SBA 12/3/2007 - r/favorably - Yes {8} No {4} Not Voting {3} Abstains {0} - Roll Call

Session Voting:
Sen. 12/10/2007 - TABLE MOTION - Yes {20} No {14} Not Voting {6} - Roll Call
Sen. 12/10/2007 - 3RDG FINAL PASSAGE - Yes {21} No {16} Not Voting {3} - Roll Call
Asm. 12/13/2007 - SUBSTITUTE FOR A3716 Acs - Yes {0} No {0} Not Voting {80} Abstains {0} - Voice Vote Passed
Asm. 12/13/2007 - MOTION TAB MOTION - Yes {43} No {31} Not Voting {6} Abstains {0} - Roll Call
Asm. 12/13/2007 - 3RDG FINAL PASSAGE - Yes {44} No {36} Not Voting {0} Abstains {0} - Roll Call

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EXHIBIT 4

CHAPTER 321

AN ACT creating a study commission on the death penalty and imposing a moratorium on executions and amending P.L.1983, c.245.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and declares that:

a. Life is the most valuable possession of a human being; the State should exercise utmost care to protect its residents' lives from homicide, accident, or arbitrary or wrongful taking by the State;

b. The experience of this State with the death penalty has been characterized by significant expenditures of money and time;

c. The financial costs of attempting to implement the death penalty statutes may not be justifiable in light of the other needs of this State;

d. There is a lack of any meaningful procedure to ensure uniform application of the death penalty in each county throughout the State;

e. There is public concern that racial and socio-economic factors influence the decisions to seek or impose the death penalty;

f. There has been increasing public awareness of cases of individuals wrongfully convicted of murder, in New Jersey and elsewhere in the nation;

g. The Legislature is troubled that the possibility of mistake in the death penalty process may undermine public confidence in our criminal justice system;

h. The execution of an innocent person by the State of New Jersey would be a grave and irreversible injustice;

i. Many citizens may favor life in prison without parole or life in prison without parole with restitution to the victims as alternatives to the death penalty; and

j. In order for the State to protect its moral and ethical integrity, the State must ensure a justice system which is impartial, uncorrupted, equitable, competent, and in line with evolving standards of decency.

2. a. There is established the New Jersey Death Penalty Study Commission.

b. The commission shall study all aspects of the death penalty as currently administered in the State of New Jersey, including but not limited to the following issues:

(1) whether the death penalty rationally serves a legitimate penological intent such as deterrence;

(2) whether there is a significant difference between the cost of the death penalty from indictment to execution and the cost of life in prison without parole; in considering the overall cost of the death penalty in New Jersey, the cost of all the capital trials that result in life sentences as well as the death sentences that are reversed on appeal must be factored into the equation;

(3) whether the death penalty is consistent with evolving standards of decency;

(4) whether the selection of defendants in New Jersey for capital trials is arbitrary, unfair, or discriminatory in any way and there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process;

(5) whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison;

(6) whether the penological interest in executing some of those guilty of murder is sufficiently compelling that the risk of an irreversible mistake is acceptable; and

(7) whether alternatives to the death penalty exist that would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of families of victims.

c. The commission will propose new legislation, if appropriate.

d. The commission shall be composed of 13 members. Appointments should reflect the diversity of the population of New Jersey. Members will be appointed as follows:

(1) five members appointed by the Governor, at least one of whom shall be appointed from each of the following groups: Murder Victims Families for Reconciliation and the New Jersey Crime Victims' Law Center; and at least two of whom shall be appointed from the religious/ethical community in New Jersey;

(2) two members appointed by the President of the Senate, one of whom shall be a Republican, and one of whom shall be a Democrat;

(3) two members appointed by the Speaker of the General Assembly, one of whom shall be a Republican, and one of whom shall be a Democrat;

(4) the Public Defender or his designee;

(5) the Attorney General or his designee;

(6) the President of the New Jersey State Bar Association or his designee; and

(7) a representative of the County Prosecutors Association of New Jersey.

e. Members shall be appointed within 45 days of enactment.

f. The Office of Legislative Services shall provide staffing for the work of the commission.

g. The members of the commission shall serve without compensation, but may be reimbursed for necessary expenses incurred in the performance of their duties, within the limits of funds appropriated or otherwise made available to the commission for its purposes.

h. The commission shall choose a chairperson from among its members.

i. Any vacancy in the membership shall be filled in the same manner as the original appointment.

j. The commission is entitled to the assistance and service of the employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for its purposes, and to employ stenographic and clerical assistance and to incur traveling or other miscellaneous expenses as may be necessary in order to perform its duties, within the limits of funds appropriated or otherwise made available to it for its purposes.

k. The commission may meet and hold hearings at the places it designates during the sessions or recesses of the Legislature and shall report its findings and recommendations to the Governor and the Legislature, along with any legislation it desires to recommend for adoption by the Legislature, no later than November 15, 2006.

3. Beginning on the effective date of this act, if a defendant has been sentenced to death pursuant to subsection c. of N.J.S.2C:11-3, the sentence of death will not be executed prior to 60 days after the issuance of the commission's report and recommendations.

4. Section 5 of P.L.1983, c.245 (C.2C:49-5) is amended to read as follows:

C.2C:49-5 Warrant of execution; date.

5. a. When a person is sentenced to the punishment of death, the judge who presided at the sentencing proceeding or if that judge is unavailable for any reason, then the assignment judge of the vicinage and, if not available, then any Superior Court judge of the vicinage, shall make out, sign and deliver to the sheriff of the county, a warrant directed to the commissioner, stating the conviction and sentence, appointing a date on which the sentence shall be executed, and commanding the commissioner to execute the sentence on that date except as provided in section 3 of P.L.2005, c.321.

b. If the execution of the sentence on the date appointed shall be delayed while the conviction or sentence is being appealed, the judge authorized to act pursuant to subsection a. of this section, at the conclusion of the appellate process, if the conviction or sentence is not set aside, shall make out, sign and deliver another warrant as provided in subsection a. of this section. If the execution of the sentence on the date appointed is delayed by any other cause, the judge shall, as soon as such cause ceases to exist, make out, sign and deliver another warrant as provided in subsection a. of this section.

c. The date appointed in the warrant shall be not less than 30 days and not more than 60 days after the issuance of the warrant. The commissioner may fix the time of execution on that date.

5. This act shall take effect immediately.

Approved January 12, 2006.