

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 DAVID BURNS,

4 Petitioner,

5 vs.

6
7 THE HONORABLE JUDGE JEROME T.
8 TAO, EIGHTH JUDICIAL DISTRICT
9 COURT OF THE STATE OF NEVADA

10 Respondent.

Supreme Court Electronically Filed
District Court Case No. 14-0215
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Clerk of Supreme Court

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12
13 **APPENDIX TO PETITION FOR**
14 **WRIT OF MANDAMUS OR**
15 **WRIT OF PROHIBITION**
16 **VOLUME II**
17 **(PA 146- PA 349)**
18

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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 Huttie, 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
Connors, 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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 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.

EXHIBIT 5



NEW JERSEY
DEATH PENALTY STUDY
COMMISSION REPORT

JANUARY 2007



State of New Jersey

REVEREND M. WILLIAM HOWARD, JR.
Chairman

JAMES P. ABBOTT
HONORABLE JAMES H. COLEMAN, JR.
EDWARD J. DeFAZIO
KATHLEEN GARCIA
KEVIN HAVERTY
EDDIE HICKS
THOMAS F. KELAHER
HONORABLE STUART RABNER
HONORABLE JOHN F. RUSSO
RABBI ROBERT SCHEINBERG
YVONNE SMITH SEGARS
MILES S. WINDER, III

NEW JERSEY DEATH PENALTY STUDY COMMISSION

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(609) 292-5526
(609) 292-6510 fax

January 2, 2007

Honorable Jon Corzine
Governor of New Jersey

Honorable Richard J. Codey
President of the Senate

Honorable Joseph J. Roberts, Jr.
Speaker of the General Assembly

Dear Sirs:

The New Jersey Death Penalty Study Commission is pleased to submit our report and recommendations pursuant to P.L.2005, c.321. The enactment directed the Commission to study all aspects of the death penalty as currently administered in the State of New Jersey and to report our findings and recommendations to the Governor and Legislature together with any legislation we recommend for adoption by the Legislature.

Sincerely,

Rev. M. William Howard, Jr.
Chairman

STATEMENT FROM THE CHAIRMAN

It has been my great privilege and pleasure to work with the sterling group of women and men who constituted the Death Penalty Study Commission, as well as the very able staff assigned to assist us in this important work. It was also reassuring to meet and to hear all the great people who were willing to come and share their views and experiences in testimony to the Commission in its public sessions. The people of the State of New Jersey have been greatly served by these and all who took part in making this report possible.

We were the beneficiaries of many submissions, in addition to the personal testimonies, which came in the form of written opinions, articles, books, scholarly papers and videos that addressed virtually every aspect of the issues before us.

However, the findings and recommendations in this report are the fruits of the Commissioners' own thoughtful, sensitive deliberations, having shown respectful regard for the differing perspectives that exist. Each Commissioner has contributed greatly to this body of work.

Now, we commend this report, including its recommendations, to our elected officials in State government, hoping they will take to heart what we have recommended, then to lead our State into a new era of jurisprudence that will convey a sense of justice to all concerned.

— M. William Howard, Jr.

MEMBERS OF THE NEW JERSEY DEATH PENALTY STUDY
COMMISSION

Reverend M. William Howard, Jr., Chairman

James P. Abbott

Honorable James H. Coleman, Jr.

Edward J. De Fazio

Kathleen Garcia

Kevin Haverty

Eddie Hicks

Thomas F. Kelaher

Honorable Stuart Rabner

Honorable John F. Russo

Rabbi Robert Scheinberg

Yvonne Smith Segars

Miles S. Winder, III

COMMISSION STAFF

Gabriel R. Neville	Miriam Bavati	Debra L. Mayberry
<i>Commission Aide</i>	<i>Commission Aide</i>	<i>Secretary</i>

Office of Legislative Services
Judiciary Section

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EXECUTIVE SUMMARY

The New Jersey Death Penalty Study Commission was created by P.L.2005, c.321. The enactment directed the Commission to study all aspects of the death penalty as currently administered in New Jersey and to report its findings and recommendations, including any recommended legislation, to the Legislature and the Governor. The enactment also directed the Commission to study seven specific issues. The Commission's findings and recommendations are set out below.

FINDINGS

- (1) There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.
- (2) The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.
- (3) There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.
- (4) The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.
- (5) Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.
- (6) The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.
- (7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.
- (8) Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

RECOMMENDATIONS

The Commission recommends that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide.

FORWARD

On January 12, 2006, Governor Richard J. Codey signed into law P.L.2005, c.321, establishing the New Jersey Death Penalty Study Commission. Pursuant to subsection d. of section 2 of P.L.2005, c.321, the Commission was composed of 13 members: five appointed by the Governor, two by the President of the Senate, two by the Speaker of the General Assembly, and four ex officio.

Governor Jon S. Corzine appointed Eddie Hicks, a member of Murder Victims Families for Reconciliation; Kathleen Garcia, a member of the New Jersey Crime Victims' Law Center; the Reverend M. William Howard, Jr., of Bethany Baptist Church in Newark; Rabbi Robert Scheinberg of the United Synagogue of Hoboken; and the Honorable James H. Coleman, Jr., a retired justice of the New Jersey Supreme Court. The President of the Senate, Richard J. Codey, appointed the Honorable John F. Russo, former President of the New Jersey State Senate, and West Orange Police Chief James P. Abbott. The Speaker of the General Assembly, Joseph J. Roberts, Jr., appointed Kevin Haverty, an attorney in private practice, and Ocean County Prosecutor Thomas F. Kelaher. The ex officio members of the Commission were Public Defender Yvonne Smith Segars; the Attorney General;¹ the designee of the President of the New Jersey State Bar Association, Miles S. Winder, III; and Hudson County Prosecutor Edward J. De Fazio, representing the County Prosecutors Association of New Jersey.

Section 2 of P.L.2005, c.321 charged the Commission with studying all aspects of the death penalty as currently administered in the State of New Jersey and making a report of its findings and any proposed legislation to the Legislature and the Governor prior to November

¹ Attorney General Zulima Farber attended the Commission's organizational meeting on June 9, 2006 and the Commission's public hearing on July 19, 2006. The Attorney General's designee, Boris Moczula, attended the other meetings of the Commission. Anne Milgram was Acting Attorney General for several weeks until Stuart Rabner was sworn in on September 26, 2006.

15, 2006. In addition to the Commission's general charge, subsection b. of section 2 of P.L.2005, c.321 required the Commission to study the following seven 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;
- (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.

The Commission organized on June 9, 2006, and selected the Reverend M. William Howard, Jr., as its chairperson. On June 21, 2006, the Commission met in executive session and developed a tentative schedule for achieving its charge within the time allocated. Pursuant to this schedule the Commission met monthly during July and August and biweekly during September, October, and November to hold public hearings and deliberate.

The Commission held a total of five public hearings during which the members heard from numerous witnesses including: family members of murder victims, persons wrongfully convicted, and members of the general public. Invitations to speak were extended to leading academic experts on the subject of capital punishment, both opposed and in favor of the death penalty; victims' rights advocates; and public officials from the Judiciary, the Office of the

Public Defender, and the Department of Corrections. Transcripts of all meetings of the Commission where testimony was received were prepared and made available to the public on the Internet and at the New Jersey State Library.

The Commission also received and reviewed a substantial amount of written material submitted by the general public, persons invited to address the Commission, and the members of the Commission themselves. Materials received by the Commission are listed in the bibliography.

The New Jersey Death Penalty: History and Current Law

UNITED STATES SUPREME COURT

The last execution in New Jersey took place in 1963. Subsequent executions were suspended in the State due to uncertainty about the United States Supreme Court's views on the constitutionality of the death penalty. The Supreme Court struck down a number of state death penalty statutes in 1972, holding that, as then administered, the capital punishment laws violated the Eighth Amendment's ban on "cruel and unusual punishment." In the words of Justice Potter Stewart, death sentences were "freakishly" and arbitrarily imposed. Furman v. Georgia, 408 U.S. 238, 310 (1972)

Following the Furman decision, many states re-wrote their death penalty statutes to comply with the Court's mandate that the statutes provide juries with adequate guidance in imposing a death sentence. The new statutes differed from prior laws in allowing the death penalty only for murder and in setting out specific standards and criteria that the jury would use in making the death penalty decision.

In 1976, the Court upheld the constitutionality of the new death penalty statutes in Gregg v. Georgia, 428 U.S. 153 (1976), finding that the revised laws contained procedural safeguards which were sufficiently stringent to ensure the constitutionality of capital punishment.

NEW JERSEY STATUTE

New Jersey's current death penalty statute, enacted six years after the Gregg decision on August 6, 1982, was modeled on statutes found to be constitutional by the United States Supreme Court. N.J.S.A.2C:11-3 provides that a defendant is eligible for the death penalty if the defendant: (1) Purposely or knowingly causes death, or serious bodily injury resulting in death, and (2) Commits the homicidal act by his own conduct, or contracts for the murder. Also eligible for the death penalty are the following defendants: (1) A defendant who, as a leader of a narcotics trafficking network, commanded or solicited a murder, and (2) a defendant who committed a murder during the commission of the crime of terrorism.

The statute provides that defendants convicted of "felony murder" (unintentional death which occurs during the course of commission of certain crimes), as well as juvenile defendants who are tried as adults, are not eligible for the death penalty.

Under the statute, after the determination of guilt at the end of a guilt-phase trial, the court conducts a second, separate proceeding to determine whether a defendant convicted of capital murder will be sentenced to death. During the penalty proceeding, the jury weighs the "aggravating factors" of the case (such as the defendant's previous conviction for murder, or the fact that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim,") against the "mitigating factors" (such as the victim's participation in or consent to the conduct which resulted in his death, or the defendant's impaired capacity to appreciate the wrongfulness of his conduct, due to mental disease or defect or intoxication).

The statute sets out twelve different aggravating factors and eight different mitigating factors for the jury to consider. The defendant may be sentenced to death only if the jury unanimously finds that all of the aggravating factors outweigh all of the mitigating factors beyond a reasonable doubt.

The New Jersey Supreme Court has affirmed the constitutionality of the death penalty statute. State v. Biegenwald, 106 N.J. 13 (1987); State v. Ramseur, 106 N.J. 123 (1987). However, despite holding that the death penalty is constitutional, the Court reversed the first 28 death sentences that were imposed under the post Gregg v. Georgia death penalty statute before upholding the death penalty for the first time (State v. Marshall, 130 N.J. 109 (1992))².

Since the enactment of the death penalty statute in 1982, there have been 228 capital murder trials. Juries have returned death sentences in 60 cases. The Court has overturned 57 of those death sentences. Out of the 60 death sentences imposed, nine such inmates are currently on death row. The inmates on death row currently have appeals pending in State and/or Federal court.

CONSTITUTIONAL AMENDMENT: "PURPOSELY OR KNOWINGLY CAUSING SERIOUS BODILY INJURY"

In 1992, the voters of the State approved a constitutional amendment providing that it is not cruel and unusual punishment to impose the death penalty on a person who has purposely or knowingly caused death or purposely or knowingly caused serious bodily injury resulting in death, if he committed the act himself or paid another to do it. That amendment was approved by the Legislature in response to some murder cases that were reversed by the New Jersey Supreme Court on grounds that the State Constitution limited the imposition of the death penalty only to a defendant who "purposely or knowingly causes death." See, e.g., State v. Gerald, 113 N.J. 40 (1988) and State v. Harvey, 121 N.J. 407 (1990).

² Robert Marshall's death sentence was later overturned by a federal court. See Marshall v. Cathel, 428 F.3d 452 (3d. Cir. 2005), cert. den. Cathel v. Marshall, 126 S. Ct. 1587 (2006). In August 2006 he was sentenced to life imprisonment with a 30-year term of parole ineligibility. Because he received credit for time served, Mr. Marshall will become eligible for parole in 2014.
[Schwaneberg, Robert. "Marshall Gets Life in Prison." Star-Ledger August 19, 2006: p. 1.]

STATUTORY AMENDMENTS

The Legislature has amended the death penalty statute 15 times since its enactment in 1982. (See P.L.1985, c.178; P.L.1985, c.478; P.L.1992, c.5; P.L.1992, c.76; P.L.1993, c.27; P.L.1993, c.111; P.L.1993, c.206; P.L.1994, c.132; P.L.1995, c.123; P.L.1996, c.115, s.1; P.L.1997, c.60, s.1; P.L.1999, c.209; P.L.1999, c.294, s.1; P.L.2000, c.88; P.L.2002, c.26, s.10.)

The statutory amendments to the death penalty statute are as follows:

P.L.1985, c.178, s.2 provided that evidence offered by the prosecution concerning aggravating factors must be governed by the Rules of Evidence, but the defendant may offer evidence concerning mitigating factors without regard to the Rules of Evidence; clarified that an alternate juror may participate in the sentencing proceeding; clarified that the aggravating factors must outweigh mitigating factors beyond a reasonable doubt for a death sentence to be imposed; provided that the Supreme Court would conduct a proportionality review of the sentence upon request of the defendant; and provided that the court must inform the jury of the sentences which may be imposed if the defendant is not sentenced to death.

P.L.1985, c.478 provided that in any instance where the defendant does not appeal a death sentence, the Office of the Public Defender or other counsel appointed by the court must file the appeal; and provided that a juvenile who has been tried as an adult and convicted of murder shall not be sentenced to death.

P.L.1992, c.5 clarified the standards to be used by the New Jersey Supreme Court in conducting "proportionality review." That step requires the Court to decide whether each death sentence was applied fairly. Subsection e. of N.J.S.A.2C:11-3 provides:

Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine

whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This enactment clarified the Legislature's intent to provide that the proportionality review to be conducted will compare the death penalty case at issue only to other similar death penalty cases in which a sentence of death was imposed. Under the amendment, new language was added to N.J.S.A.2C:11-3e. providing that proportionality review would be limited to a comparison of similar cases in which a sentence of death was imposed. However, the New Jersey Supreme Court adopted a broader standard. In re Proportionality Review Project, 161 N.J. 71 (1999).

P.L.1992, c.76 provided that the jury cannot be provided with evidence concerning the method or manner of execution which would be imposed on a defendant sentenced to death.

P.L.1993, c.27 made leaders of narcotics trafficking networks who command or by threat or promise solicit the murder eligible for the death penalty, and added such murders to the list of "aggravating factors" used in sentencing.

P.L.1993, c.111 clarified that the term "homicidal act" in the statute means conduct that causes death or serious bodily injury resulting in death.

P.L.1993, c.206 added as an additional aggravating factor that the defendant caused death when committing the criminal act of "causing or risking widespread injury or damage" (N.J.S.A.2C:17-2).

P.L.1994, c.132 added as an additional aggravating factor that the victim was less than 14 years old.

P.L. 1995, c. 123 permitted prosecutors to introduce victim impact evidence at the separate sentencing phase of a death penalty trial.

P.L. 1996, c.115 provides for life imprisonment without parole for murderers convicted of killing law enforcement officers but who escape the death penalty.

P.L. 1997, c. 60 provides that if a person convicted of capital murder is not sentenced to death, a term of life imprisonment with no eligibility for parole would be imposed when the victim of the offense was less than 14 years old and the homicide was committed during the commission of a sexual offense.

P.L. 1999, c. 209 adds violation of a domestic violence restraining order to the list of aggravating factors in the statute.

P.L. 1999, c. 294 permits a survivor of a homicide victim to display a photograph of the victim, taken before the homicide, at sentencing.

P.L. 2000, c. 88 provides that in a capital case, if (1) the jury or court finds the existence of one or more aggravating factors but finds that the aggravating factors do not outweigh the mitigating factors found to exist by the jury or the court, or (2) the jury or court is unable to reach a unanimous verdict as to the weight of the factors, the defendant shall be sentenced to life imprisonment without parole eligibility.

P.L. 2002, c. 26, s. 10 provides that a person who commits the crime of terrorism (as defined in N.J.S.A.2C:38-2) is eligible for the death penalty if a murder occurred during the commission of the terrorism. This amendment also added as an aggravating factor that the murder was committed during the commission of a crime of terrorism.

COMMISSION MEETINGS

COMMISSION HEARINGS

The Commission held five public hearings during the course of its work. The following is a list of those hearings and witnesses in order of their appearance. All of these public hearings were transcribed and a list is provided at the end of the Appendix referencing the page numbers at which the testimony presented by each witness begins in the transcript for that hearing. Please note that some of these individuals also submitted written testimony which is included in the Appendix to the transcript.

Transcripts of the five public hearings are available in hard copy and online at www.njleg.state.nj.us/committees/njdeath_penalty.asp.

PUBLIC HEARING

July 19, 2006

Committee Room 4, State House Annex, Trenton, New Jersey

Most Reverend John M. Smith

Bishop of the Roman Catholic Diocese of Trenton

Sharon Hazard-Johnson

Private Citizen

Larry Peterson

Private Citizen

Barry C. Scheck, Esq.

Co-Director

Innocence Project in New York City

Rabbi Gerald Zelizer

Rabbi

Congregation Neve Shalom

Lorry W. Post

Private Citizen

Founder

New Jerseyans for Alternatives to the Death Penalty

Kate Hill Germond

Assistant Director

Centurion Ministries

Reverend Jack Johnson

Senior Pastor, First United Methodist Church of New Jersey
President, Coalition of Religious Leaders of New Jersey
Co-Chair, Board of Church and Society Greater New Jersey Conference United Methodist Church

Richard C. Dieter

Executive Director
Death Penalty Information Center in Washington, D.C.

Dr. Matthew B. Johnson, Ph.D.

Associate Professor
John Jay College of Criminal Justice in New York

Sandra Manning, Esq.

Chair
New Jerseyans for Alternatives to the Death Penalty

Edith Frank

Director, League of Women Voters of New Jersey

Michael Murphy, Esq.

Member, Advisory Committee
New Jerseyans for Alternatives to the Death Penalty

Marilyn Zdobinski, Esq.

Former Assistant Prosecutor in Passaic County

Dr. Robert Johnson, Ph.D.

Professor, School of Public Affairs
Department of Justice, Law, and Society
American University

Alisa Mariani

Vice President
Somerset County American Civil Liberties Union
(written testimony only)

PUBLIC HEARING

September 13, 2006

Committee Room 4, State House Annex, Trenton, New Jersey

Hon. Raymond J. Lesniak

State Senator representing the 20th Legislative District

Sandra Place

Private Citizen

Patricia Harrison

Private Citizen

Jo Anne Barlieb

Private Citizen

Richard D. Pompelio, Esq.

Founder, New Jersey Crime Victims' Law Center

Former Chairman of the New Jersey Victims of Crime Compensation Board

Hon. Robert J. Del Tufo, Esq.

Former Attorney General of New Jersey

Hon. Robert J. Martin

State Senator representing the 26th Legislative District

Patrick Murray, M.A.

Founding Director

Monmouth University Polling Institute

Vicki Schieber

Member, Board of Directors

Murder Victims' Families for Human Rights

Juan Roberto Melendez Colon

Private Citizen

Daniel J. Carluccio, Esq.

Former Ocean County Prosecutor

Marilyn Flax

Private Citizen

Marilyn Zdobinski, Esq.

Former Assistant Prosecutor in Passaic County

Jonathan E. Gradess
Executive Director
New York State Defenders' Association

Sharon Hazard-Johnson
Private Citizen

Brian W. Kincaid, Esq.
Attorney in private practice

Anna "Cuqui" Rivera
Delegate
Latino Leadership Alliance of New Jersey.

Mr. and Mrs. Gunnar Marsh
Private Citizens
(written testimony only)

PUBLIC HEARING

September 27, 2006

Committee Room 4, State House Annex, Trenton, New Jersey

James Wells

President

New Jersey Chapter of the National

Association of Black Law Enforcement Officers, Inc.

Nate Walker

Private Citizen

Jennifer Thompson

Private Citizen

David Kascynski

Executive Director

New Yorkers Against the Death Penalty

John P. (Jack) Callahan

Private Citizen

Bill Babbitt

Member, Board of Directors

Murder Victims' Families for Human Rights

Kirk Bloodsworth

Private Citizen

Wanda Foglia, Ph.D.

Professor

Coordinator of the Master of Arts in Criminal Justice Program

Rowan University

James E. Harris

President

New Jersey State Conference of the National

Association for the Advancement of Colored People

Lawrence Hamm

Chairman

People's Organization for Progress

PUBLIC HEARING

October 11, 2006

Committee Room 4, State House Annex, Trenton, New Jersey

Hon. David Baime

Superior Court Appellate Division Judge (retired)

Special Master for Proportionality Review

New Jersey Judiciary

Robert Blecker

Professor of Law

New York Law School

Jeffrey Fagan

Professor of Law & Public Health

Co-Director, Center for Crime, Community and Law

Columbia University

Claudia Van Wyk, Esq.

Attorney

Gibbons, Del Deo, Dolan, Griffinger & Vecchione

Formerly an attorney in the Office of the Public Defender

Appellate Section

Robin Glenn, Esq.

Legal Research Consultant

PUBLIC HEARING

October 25, 2006

Committee Room 16, State House Annex, Trenton, New Jersey

Kent Scheidegger

Legal Director and General Counsel
Criminal Justice Legal Foundation
(testified by videoconference)

Sam Millsap

District Attorney
Bexar County, Texas
(1982-1987)

Charles Ogletree, Jr.

Jesse Climenko Professor of Law
Harvard Law School
Director,
Charles Hamilton Houston Institute for Race and Justice
(testified by videoconference)

Jim Barbo

Director of Operations
New Jersey Department of Corrections

Gary J. Hilton

Former Superintendent of Trenton State Prison
Former Assistant Commissioner
New Jersey Department of Corrections

William Carl Piper, II

Private Citizen

Molly Weigel

Private Citizen

Celeste Fitzgerald

Director
New Jerseyans for Alternatives to the Death Penalty

Kathleen M. Hiltner

Executive Director
Center for Traumatic Grief & Victim Services

Janet Poinsett, L.C.S.W.
Member, clinical staff
Center for Traumatic Grief & Victim Services

David Shepard
Private Citizen

Bryan Miller
Executive Director, Ceasefire New Jersey

Kathryn Schwartz
Chaplain
Morris County Correctional Facility

Roy Riley
Bishop
New Jersey Synod, Evangelical Lutheran Church in America
(testimony read by Ms. Schwartz)

David Ruhnke, Esq.
Attorney
Runke & Barrett

Clare Laura Hogenauer
Private Citizen

John P. Nickas
Representing Saint Peter Claver Church

Thomas F. Langan, Jr.
Representing New Jersey Pax Christi

Hon. Joseph Azzolina
Former State Senator and Assemblyman from the 13th Legislative District
(testimony read into record)

Marilyn Zdobinski, Esq.
Former Assistant Prosecutor in Passaic County
(written testimony only)

Sharon Hazard-Johnson
Private Citizen
(written testimony only)

WORKING SESSION

The Commission held a public working session during the course of its work. The following is a list of the witnesses in order of their appearance. This public working session was transcribed. That transcript is available in hard copy and online at www.njleg.state.nj.us/committees/njdeath_penalty.asp.

WORKING SESSION

August 16, 2006

Committee Room 16, State House Annex, Trenton, New Jersey

R. Erik Lillquist

Professor

Seton Hall University School of Law

Honorable John J. Gibbons

Former Chief Judge

United States Court of Appeals

Third Circuit

Joseph K. Krakora, Esq.

Director

Capital Litigation

New Jersey Office of the Public Defender

FINDINGS

FINDINGS

P.L.2005, c.321 directs the Commission to study all aspects of the death penalty as currently administered in New Jersey, including but not limited to seven specific issues enumerated in the enactment. The Commission organized its analysis and conclusions around those seven issues. In addition, the Commission made recommendations about an eighth issue, concerning the provision of services for murder victims' families.

The issues and the Commission's findings follow.

FINDINGS OF THE NEW JERSEY DEATH PENALTY STUDY

COMMISSION

There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.

The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

ISSUE 1

WHETHER THE DEATH PENALTY RATIONALLY SERVES A LEGITIMATE PENOLOGICAL INTENT SUCH AS DETERRENCE

Commission's Finding: There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

The penological objectives generally cited by supporters of the death penalty are deterrence and retribution.

Deterrence

The published studies on whether the death penalty functions as a deterrent to other murders are conflicting and inconclusive.

Several witnesses testified that, because the death penalty is carried out so rarely across the country (and has never been carried out in New Jersey under the 1982 act) deterrence is a particularly difficult issue to measure. There were approximately 16,000 murders in the United States in 2005; 125 defendants were sentenced to death that year; 60 were executed. Thus, less than 1 percent of those who commit murder nationwide ultimately receive the death penalty and less than one-half of that small number are executed.

In New Jersey, a similarly small percentage of defendants await execution. There were 418 murders in the State in 2005. In the 24 years since the restoration of the death penalty in this State in 1982 there have been only 455 "death-eligible" defendants (cases in which the evidence supported the elements of a capital prosecution). Of those, 228 were tried capitally and 60 death sentences were imposed. Only nine persons are currently on death row. That translates to less than 2 percent of the death-eligible defendants and an even smaller percentage of the total number of defendants convicted of capital murder.

The measurement of any deterrent effect based on such minuscule percentages is fraught with difficulty. Nonetheless, more than a dozen studies have been published in the past 10 years reaching opposite conclusions. Some claim that the death penalty has a strong deterrent effect. Some proponents claim that studies show that each execution can prevent between three and 18 homicides. Other studies conclude that the death penalty has little if any deterrent effect.

According to Professor Jeffrey Fagan of Columbia University Law School, however, many of these studies use incomplete data or are otherwise flawed. For example, all but one of the studies group all types of murder together, claiming that all are equally deterred by the death penalty. However, many murders are not planned in advance but are committed impulsively or in a sudden outburst of rage. It is not logical, according to Professor Fagan, to believe that such defendants would respond rationally to threats of punishment.

In Professor Fagan's testimony before the Subcommittee on the Constitution, Civil Rights and Property Rights of the United States Senate Judiciary Committee in February 2006 he also noted that "domestic" or intimate partner homicides have been declining steadily since the early 1970's, regardless of fluctuations³ in the number of executions since capital punishment was reinstated in this country following the 1976 Gregg decision.

Richard Dieter⁴, Executive Director of the Death Penalty Information Center in

³ According to the Death Penalty Information Center, there have been 1,056 executions in the United States since 1976. (Data updated as of November 14, 2006.) The numbers of executions fluctuate yearly: For example, there were five executions in 1983; 25 in 1987; 14 in 1991; 68 in 1998; a high of 98 executions in 1999; 59 in 2004 and 60 in 2005.
<http://www.deathpenaltyinfo.org/article.php?scid=8&did=146>

⁴ Oral testimony of Richard Dieter to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 37-45 of hearing transcript.

Washington, D.C., testified before the Commission that the states without a death penalty⁵ have far *lower* murder rates than the states with the death penalty. Mr. Dieter also noted that of the four geographic regions in the United States, the South has the highest murder rate, yet carries out 80% percent of the executions in the country. By contrast, the Northeast has the lowest murder rate and carries out less than 1% of the executions.

According to Professor Fagan, many of the social factors that explain homicide rates, such as demographic composition and poverty, also predict death sentencing rates among the states. Professor Fagan noted that state homicide rates are influenced by powerful social, economic and legal forces which change at a relatively slow pace, and thus are unlikely to be influenced by the effects of extremely rare events such as executions. Professor Fagan also stated that the deterrence studies ignore large amounts of missing data from states such as Florida, which carry out a large number of executions, and that by leaving out this data the results are likely to be biased.

He noted that the studies do not take into account the fact that most states in most years have no executions. In addition, the studies do not take into account the fact that a large percentage of executions takes place in only one state, Texas, which was responsible for over one-third of the 965 executions in this country between 1976 and June 2004. Thus, attempting to calculate deterrent effects from this data is misleading.

Professor Fagan also noted that the studies do not test deterrence directly; that is, the studies fail to show that murderers are actually aware of executions that take place in their states or in other states.

⁵ 13 states, and the District of Columbia, do not have a death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New York, Rhode Island, Vermont, West Virginia and Wisconsin. (Although New York enacted a death penalty statute in 1995, it was struck down by the state's high court in 2004 and has not been re-enacted.)

By contrast with Professor Fagan, the Commission heard testimony (by video conference) from Kent Scheidegger⁶, legal director of the Criminal Justice Legal Foundation in Sacramento, California, that the death penalty “does have a deterrent effect and does save innocent lives if it is actually enforced.” Mr. Scheidegger presented data that, he stated, showed that states that actively use the death penalty have had the greatest improvements in murder rates since the 1976 restoration of the death penalty nationwide. Mr. Scheidegger stated that New Jersey does not have an effective death penalty because our “court of last resort is determined to block it and willing to twist the law to do so.”

Testimony on deterrence was also received from Professor Erik Lillquist⁷ of Seton Hall University School of Law, who stated that recent econometric studies suggest that the death penalty does have a deterrent impact, at least if the death penalty is carried out in sufficient numbers. He also stated that, paradoxically, studies suggest that under some circumstances executions can cause a “brutalization effect” so that the murder rate will increase. He stated:

It just may be impossible to know what the deterrent or brutalization effect is here . . . at least as an empirical matter – simply because we’re never going to have a large enough database that can be removed of the confounding variables, such that we can come to a conclusion. When scientists run studies in general, we try to do it in a controlled environment. You can’t do that with murders and the death penalty . . . So we have to do these econometric studies.

⁶ Oral testimony of Kent Schiedegger to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 5-15 of hearing transcript.

⁷ Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 27-51 of hearing transcript.

But they have confounding variables we can't control, because we can't control them well enough given the limited data sizes. We may never be able to get a firm conclusion as to whether or not a deterrent value exists.

Nearly twenty years ago, the New Jersey Supreme Court discussed the inconsistencies among deterrence studies in State v. Ramseur, 106 N.J. 123 (1987). The Court's conclusions are still valid today:

The argument about deterrence is different. All accept its legitimacy as a penological goal; the division, and it is a sharp one, concerns an empirical question. Does the death penalty deter murder? The answers, the reasons, and the statistics conflict and proliferate,¹⁴ but add up to only one conclusion: the Legislature could reasonably find that the death penalty deters murder, just as it could find that it does not. Given the plethora of scientific analysis, "common-sense" explanations of the penalty's deterrent effect based on logic . . . are neither persuasive nor important.

----- Footnote -----

¹⁴ See Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," 65 Am.Econ.Rev. 397 (1975) (purporting to establish a deterrent impact) and its progeny of critics, e.g., Baldus & Cole, "A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment," 85 Yale L.J. 170 (1975); Bowers & Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment," 85 Yale L.J. 187 (1975); McGahey, "Dr. Ehrlich's Magic Bullet: Economic Theory,

Econometrics, and the Death Penalty," 26 Crime & Delinquency 485 (1980).

State v. Ramsey at 179-180. [Citations omitted.]

The Commission also notes that, as a practical matter, the length of time that convicted murderers in New Jersey serve on death row argues against the usefulness of the death penalty as a deterrent. For example, Robert Marshall spent 22 years on death row after his 1984 conviction for the murder of his wife (before his death sentence was overturned and he was re-sentenced to a 30-year term); Marko Bey has been on death row since 1983; Nathaniel Harvey since 1986. When defendants spend decade after decade following a murder conviction waiting for a death penalty that may never be carried out, deterrence is obviated.

Retribution

Proponents of retribution argue that it upholds the dignity of a civil society and is useful to prevent people from being retributive on their own, according to the testimony of Professor Lillquist⁸. The retributivist viewpoint is in accordance with the philosophy of Immanuel Kant that, for the most heinous forms of wrongdoing, the penalty of death is morally justified or perhaps even required.⁹ The Commission also heard testimony from Professor Robert Blecker¹⁰ of New York Law School that retribution is a legitimate societal function which is served by the death penalty. Professor Blecker stated that retribution should not be equated with revenge, which is not proportional and is unlimited. Rather, he said, retribution is proportional to the crime of murder. Retribution is based on the principle

⁸ Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 27-51 of hearing transcript.

⁹ See Sunstein, Cass R., Adrian Vermeule, Carol S. Steiker, John J. Donohue and Justin Wolfers. "The Ethics and Empirics of Capital Punishment." 58 Stanford Law Review 701, 704, December 2005.

¹⁰ Oral testimony of Prof. Robert Blecker to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 32-72 of hearing transcript.

of *lex talionis*, or "an eye for an eye" – the belief that punishment should fit the crime.

In the words of Professor Blecker:

Naturally grateful, we reward those who bring us pleasure.
Instinctively resentful, we punish those who cause us pain.
Retributively, society intentionally inflicts pain and suffering
on criminals because and to the extent that they deserve it.
But only to the extent they deserve it.... Justice, a moral
imperative in itself, requires deserved punishment.¹¹

The commission was divided about whether retribution is an appropriate penological intent. Of the commission members who felt that retribution is an appropriate penological intent, some felt that this intent is achieved by incarceration, so the death penalty is not indispensable for achieving it. Other members felt that the desire for retribution is trumped by the serious problems with the death penalty like cost, irreversible error, and inconsistency with evolving standards of decency.

Incapacitation

Other commission members argued that a death sentence serves the penological purpose of incapacitating an individual from committing further acts of violence against society. They recognized that life imprisonment without the possibility of parole similarly incapacitates an individual from committing further acts of violence outside the prison context.

¹¹ Robert Blecker. Letter to the New Jersey Death Penalty Study Commission supplementing previous testimony. October 24, 2006.

ISSUE 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

Commission's Finding: The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

Financial costs of the death penalty

The Office of Legislative Services (OLS) analyzed the issue of death penalty costs in September 2006 but noted that because much data is unavailable, a precise conclusion cannot be reached. Of the four components of the criminal justice system which could potentially benefit from cost savings if the death penalty were to be abolished – the courts, the prosecutors, the Office of the Public Defender and the Department of Corrections – only the last two were able to provide detailed cost estimates to OLS.

The Office of the Public Defender estimated that, given its current caseload of 19 death penalty cases (as of August 2006), elimination of the death penalty would result in a cost savings of \$1.46 million per year. In testimony to the Commission, Joseph Krakora¹², Director of Capital Litigation in the Office of the Public Defender, noted that the office incurs additional costs in capital murder trials for pretrial preparation and investigation; pretrial motions; jury selection (which takes four to six weeks in a capital case as opposed to one or two days in a noncapital case); additional staff attorneys (because the office provides two attorneys, rather than one, in capital cases) and pool attorneys (outside counsel hired when

¹² Oral testimony of Joseph Krakora to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 51-73 of hearing transcript.

there is a conflict of interest that prevents the office from using staff attorneys); the penalty phase trial (which does not occur in noncapital cases); the mitigation investigation (a social history investigation of the defendant's background, which provides mitigating evidence for the penalty trial); enhanced costs for appeals (since more issues are raised and the courts conduct a more searching inquiry in an appeal of a defendant who faces death); enhanced costs for transcripts; proportionality reviews; and post-conviction relief.

The **Department of Corrections** estimated that eliminating the death penalty would save the State \$974,430 to \$1,299,240 per inmate over each inmate's lifetime. The department's figures were based on its estimate that the cost of housing an inmate in the Capital Sentence Unit of the New Jersey State Prison (death row) totals about \$72,602 per year. This is \$32,481 more per year than the \$40,121 cost of housing an inmate in the general population at the New Jersey State Prison, which is a maximum security institution. The department calculated that inmates enter the Capital Sentence Unit at an average age of 32, and estimated that, since no inmate has yet been put to death, each inmate would serve 30 to 40 years within the Unit.

The **Administrative Office of the Courts (AOC)** informed OLS that eliminating the death penalty would generate savings for the Judiciary in two areas: trial court costs and the costs of conducting the proportionality review for each death penalty case. The AOC estimated that each proportionality review costs an average of \$93,018 in additional salary costs for court staff. The AOC was unable to compare the cost of a death penalty trial with a non-death penalty murder trial, noting that the many different variables in murder trials preclude such a comparison. These variables include the possibility of plea bargaining (which would negate the need for a trial altogether), the relative aggressiveness of prosecution efforts and the length of jury selection.

The **Office of the Attorney General** informed OLS that there would be little cost savings for prosecutors if the death penalty were to be abolished. Those defendants who are currently death-eligible would still face the possibility of life without parole or, at minimum, a

very lengthy sentence, so a protracted trial to determine guilt would still be necessary. The Commission notes that estimating the cost to the prosecutors is difficult because the issue involves resource allocation. In other words, if prosecutors are no longer involved with a lengthy death penalty case because the death penalty has been eliminated, they will expend their efforts on other types of prosecutions and there will not be measurable cost savings.

The Commission wishes to stress the fact that, although it is not possible to measure many of the cost savings that would result from eliminating the death penalty, these savings nonetheless exist. In capital cases both the prosecution and the defense need to spend additional sums for pretrial investigation and preparation; added fees for experts for penalty phase testimony; enhanced transcript fees and travel expenses, and additional post-conviction litigation. The Office of the Attorney General noted that the State puts significant resources into the appellate practice of death penalty litigation.

The Commission notes that there have been several studies in other states designed to assess the cost of the death penalty. The Commission recognizes that there are a number of factors that affect the conclusions of these studies and the studies do not necessarily correlate directly to the cost of the death penalty in New Jersey.

Nevertheless, consistent with the Commission's finding, recent studies in states such as Tennessee, Kansas, Indiana, Florida and North Carolina have all concluded that the costs associated with death penalty cases are significantly higher than those associated with life without parole cases. These studies can be accessed through the Death Penalty Information Center.

Emotional and psychological costs of the death penalty

The Commission heard from a number of family members of murder victims about the devastating emotional costs of the death penalty. Survivors testified to the pain of being forced to relive the trauma of their loved ones' murders during prolonged appeals. Dr.

Matthew B. Johnson¹³, a psychologist and professor at John Jay College of Criminal Justice in New York, testified about the adverse effects of executions on third parties: judges, jurors, judicial staff, correctional staff, journalists, clergy and spiritual advisors, as well as the families of the victim and the families of the condemned inmate. Dr. Johnson quoted a clergy member who told him that “Executions create another set of victims.”

The Commission finds that these intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty.

¹³ Oral testimony of Dr. Matthew B. Johnson to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 40-45 of hearing transcript.

ISSUE 3

WHETHER THE DEATH PENALTY IS CONSISTENT WITH EVOLVING STANDARDS OF DECENCY

Commission's Finding: There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

Patrick Murray¹⁴, director of the Monmouth University Polling Institute, testified that support for the death penalty has declined in New Jersey in the past seven years. Mr. Murray stated that from the 1970's to 1982 (when the death penalty was reinstated in the State), a limited amount of polling conducted in the State showed that support for the death penalty ranged from 70 to 75% among New Jersey residents. Data could not be obtained for the 16-year period from 1982 to 1998, since there was no publicly available polling during that time, he stated. Since 1999, support for the death penalty "in principle" has consistently been in the range of 60%; in other words, when asked "Do you support or oppose the death penalty?" 6 out of 10 New Jersey residents answer that they support it.

However, support "in principle" does not equate with support as a policy preference, Mr. Murray noted. Thus, when the question is asked of New Jersey residents, "What do you think should be the penalty for murder – the death penalty or life imprisonment with no possibility of parole?" the results are markedly different than the figure showing 60% support. In 1999, the Star-Ledger/Eagleton-Rutgers Poll found that 44% supported the death penalty when that same question was asked and 37% preferred life without parole. In 2002, a poll conducted by Rutgers and sponsored by New Jerseyans for Alternatives to the Death Penalty found a significant decrease: only 36% now preferred the death penalty and 48% preferred life without parole. A 2005 Rutgers poll sponsored by the same group found similar results.

¹⁴Oral testimony of Patrick Murray to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 66-86 of hearing transcript.

Mr. Murray pointed out that this shift – the drop from 44% preferring the death penalty in 1999, to 36% preferring it in 2002 and 2005 – correlated with opinion polls during that time on other issues related to the death penalty. Those polls showed an increase of 10%, from 1999 to 2002, in the number of respondents who felt that the death penalty was unfairly applied to minorities and a decline in the number of New Jersey residents who believe that the death penalty serves as a deterrent. A 2000 poll conducted by Quinnipiac University found that only 40% of State residents believed that the death penalty deters other potential murderers.

A number of witnesses from the religious community testified before the Commission and they uniformly urged abolishing the death penalty. Most Rev. John M. Smith¹⁵, Bishop of the Catholic Diocese of Trenton, stated that the death penalty is not consistent with evolving standards of decency. He noted that the United States Conference of Catholic Bishops recently launched a campaign to end capital punishment, and provided a statement by the Catholic Bishops of New Jersey urging the State to abolish the death penalty.

Rabbi Gerald Zelizer¹⁶ of Congregation Neve Shalom in Metuchen testified that the Conservative and Reform movements of Judaism have passed several resolutions in the last 10 years advocating the elimination of the death penalty as violative of their religious principles. Rabbi Zelizer noted that Judaism went through a process of evolving standards of decency historically. During the First and Second Centuries, at the time of the Roman Empire, the possibility of execution was fundamentally eliminated. He noted that standards of decency have evolved in the State as well, and gave two reasons for this evolution: “One, the fear of executing innocent people; and, secondly, the fact that there are other ways to deal with criminals.”

¹⁵ Oral testimony of Most Rev. John M. Smith to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 4-9 of hearing transcript.

¹⁶ Oral testimony of Rabbi Gerald Zelizer to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 24-27 of hearing transcript.

The United States Supreme Court has noted an emerging national consensus against executing certain defendants convicted of murder: the mentally retarded and juveniles. In 2002 the Court ruled that executing the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. Atkins v. Virginia, 536 U.S. 304 (2002). That case overruled Penry v. Lynaugh, 492 U.S. 302 (1989), where the Court had ruled that the Eighth Amendment did not prohibit the execution of the mentally retarded. However, 13 years after the Penry ruling, the Court recognized the emergence of a new consensus on the issue.

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100-101.

. . . . We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331, 109 S. Ct. 2934. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, 593-596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund v. Florida*, 458 U.S. 782, 789-793, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). In *Coker*, we focused primarily on the then-recent legislation that had been

enacted in response to our decision 10 years earlier in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972) (*per curiam*), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman."

We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."

Atkins at 311-312 (2002).

In 2005, the Supreme Court held that murderers who were juveniles at the time of the crime may not be executed. Roper v. Simmons 543 U.S. 551 (2005). That case overruled Stanford v. Kentucky, 492 U.S. 361 (1989), where the Court had rejected the proposition that the Constitution bars capital punishment for juvenile offenders ages 15 to 17 at the time of the murder. Again, as in Atkins, the Court found an emerging consensus against the execution of this particular group of defendants:

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313-315, 122 S. Ct. 2242. By a similar

calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Roper at 564 (2005)

Although the Commission recognizes that similarly strong evidence of a consensus against the death penalty in general has not yet emerged, there are suggestions of such a trend:

- In January 2000, Illinois Governor George Ryan, after 13 exonerations from death row, became convinced that capital punishment in the state was “fraught with error” and imposed a moratorium on executions. He eventually pardoned four death row inmates and commuted the death sentences of 164 others to life imprisonment. Reforms implemented in 2003 at the urging of a commission created by the governor included changes in police line-up procedures and elimination of time limits on actual innocence claims in state courts. Governor Ryan’s successor, Rod R. Blagojevich, has kept the moratorium in effect.
- New York’s death penalty statute (enacted in 1995) was struck down by that state’s Court of Appeals in 2004 and the New York legislature has thus far failed to act to reinstate it. In its opinion, the state’s high court held that a “deadlock” provision in the statute was unconstitutional because it could have coerced some jurors to return a verdict of death. The provision required judges to tell the jury that if they were deadlocked and did not return with a unanimous verdict of death, or with a verdict of life without parole, the judge could impose a lighter sentence. The court called upon the legislature to correct the statute.

- In the past two years legislation to abolish the death penalty has been introduced in the legislatures of 10 states: Illinois, Kansas, Kentucky, Maryland, Missouri, Montana, New Jersey, New Mexico, Tennessee and Washington.
- Both in New Jersey and nationally the number of capital prosecutions has dropped. According to Richard Dieter of the Death Penalty Information Center nationally “since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row.”¹⁷ Similarly, Claudia Van Wyk testified that regarding the death penalty in New Jersey: “prosecutorial charging decisions have dropped off dramatically over time.”¹⁸

¹⁷ Statement of Richard Dieter to New Jersey Death Penalty Study Commission. 19 July 2006. Page 229x of hearing transcript.

¹⁸ Oral testimony of Claudia Van Wyk to the New Jersey Death Penalty Study Commission. 11 October 2006. Page 100 of hearing transcript.

ISSUE 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

Commission's Finding: The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

The Commission concludes that the available statistics do not support a finding that there is invidious racial bias in the application of the death penalty in New Jersey. That conclusion is based on the findings of the Supreme Court's Proportionality Review Project provided to the Commission by the special master for proportionality review with regard to capital causes, retired Superior Court Judge David S. Baime.

Subsection e. of New Jersey's death penalty statute, N.J.S.A.2C:11-3, requires the New Jersey Supreme Court to conduct, upon a capital defendant's request, a proportionality review to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. To carry out that review, the Court has developed a system, known as the Proportionality Review Project, for the collection of statistics concerning all cases in New Jersey in which the facts support the legal elements of a capital prosecution.

According to Judge Baime, the objectives of the Proportionality Review Project are twofold. First, the project monitors the administration of the State's capital punishment laws, focusing on the fairness of sentencing with respect to a particular defendant. That aspect of

proportionality review is called *individual* proportionality review.¹⁹ Second, the project seeks to determine whether there are at work in the system influences not germane to the legislative intent and design. To date, the principal effort in this area has been to determine whether race or ethnicity of the offender or victim influences the manner in which potentially capital cases are treated by prosecutors or juries. This aspect of proportionality is called *systemic* proportionality review.

At the Commission's public hearing on October 11, 2006, Judge Baime presented the following findings with respect to systemic proportionality review:

[T]here is no solid evidence that the race of a defendant affects the outcome of the case.

In a similar vein, there is no solid evidence that the race of the victim is an important factor in determining which defendants are sentenced to death. In terms of actual death verdicts we do not find a consistent statistically significant relationship between the race of the victim and death outcome, i.e., death verdicts.

In contrast, our bivariate studies, multivariate regression runs and case-sorting techniques indicate that white victim cases advance to penalty trial at a higher rate than cases involving African-American or Hispanic victims. We hasten to add that the white victim effect I just noted is not sustained when county variability or county disparity is taken into account. County variability refers to the difference in rates

¹⁹ Individual proportionality review is discussed further in the Commission's findings with respect to issue 5.

among the counties that death-eligible cases advance to penalty trial.

...

... In short, we find no consistent, reliable evidence that the race of the victim affects whether a death-eligible case proceeds to the penalty stage when county variability is taken into account.²⁰

The Commission heard testimony suggesting the existence of variability among counties in the application of the death penalty which, if true, would be troubling. In his testimony before the Commission, Judge Baime presented the following hypothesis:

The exact same case of a killing occurs in neighboring counties. All of the circumstances are the same. In one county the defendant is capitally prosecuted, is subject to a penalty trial, and is subject to the ultimate outcome of death. In the other county the defendant is not so treated; either through a plea bargaining or other processes he receives a penalty that is much less harsh.²¹

The apparent county variability referred to by Judge Baime may result from any number of factors. Nevertheless, the Commission is troubled by the degree to which the geographic location where the crime was committed appears to affect the ultimate disposition of the case. The Commission notes the apparent interrelationship between county disparity and statistics showing race of victim disparity. The unevenness with which cases are selected

²⁰ Oral testimony of Hon. David S. Baime to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 9 -11 of hearing transcript.

²¹ Id. at 13.

for capital prosecution among counties undermines uniformity in the capital punishment system.

The Commission also notes that the New Jersey Supreme Court, as part of its ongoing proportionality review, is concerned about this very issue. In fact, in response to Judge Baime's finding of county disparity, the Court scheduled oral argument on the issue for October 18, 2006. At that time, it heard oral argument from the Attorney General's Office, the Public Defender's Office and New Jerseyans for Alternatives to the Death Penalty as amicus. The Court sought input on the issue generally with an emphasis on whether the problem could be addressed by the implementation of a centralized decision making procedure for determining which cases should be prosecuted capitally. The Court has not issued an opinion since the argument but this is a complicated issue. Abolishing the death penalty would moot that issue and at the same time solve the race of victim disparity that Judge Baime attributes to the county disparity problem.

Although the statistics compiled by the Judiciary's Proportionality Review Project do not demonstrate racial bias in the administration of the death penalty in New Jersey, the Commission recognizes that statistical evidence must be viewed in light of the reality that racial discrimination is part of the history of the death penalty in the 20th century. In Furman v. Georgia, 408 U.S. 238 (1972), Justice Thurgood Marshall discussed the relationship between racial discrimination and capital punishment in his concurring opinion:

Regarding discrimination, it has been said that 'it is usually the poor, the illiterate, the underprivileged, the member of the minority group – the man who, because he is without means, and is defended by a court appointed attorney – who becomes society's sacrificial lamb' Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.

Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Id. at 364 (1972) (citations omitted).

In addition, testimony about the historical link between racial discrimination and capital punishment was submitted to the Commission from Professor Charles J. Ogletree, Jr, who stated: “[R]ace has had a profound and disturbing history in the application of capital punishment in this country.”²²

The Commission also notes with concern that although there is no demonstrated racial bias in the administration of the capital punishment system in New Jersey, the percentage of African American persons in New Jersey’s correctional institutions far exceeds the percentage of African Americans in the general population.²³

²² Oral testimony of Charles J. Ogletree, Jr, to the New Jersey Death Penalty Study Commission. 25 October 2006. Page 30 of hearing transcript.

²³ New Jersey State Department of Corrections. “Offenders in New Jersey Correctional Institutions on January 9, 2006, By Race/Ethnic Identification.” 2006.

ISSUE 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

*Commission's Finding: Abolition of the death penalty will eliminate the risk of
disproportionality in capital sentencing.*

The Commission finds that there may not be a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison. On October 11, 2006, the Commission heard testimony from Ms. Robin Glenn, who reviewed the nearly 600 narrative summaries prepared by New Jersey's Administrative Office of the Courts for the Supreme Court's proportionality reviews. The purpose of the narrative summaries is to permit comparison of the various murders and outcomes. Her conclusions are troubling:

Despite a numbing similarity in the circumstances of the large number of [murder] cases involving burglaries, in-home robberies, and predatory behavior against homeowners, particularly the elderly, there is no uniformity in the way the cases are charged and prosecuted. The resulting unfairness leaves one defendant on death row while others, having committed very similar offenses, were sentenced to life in prison or were not even prosecuted capitally.

....

... It is not just that there is no significant difference between the crimes to be punished by death and the crimes to be

punished by life in prison; sometimes the crime for which defendants spend life in prison, are worse.²⁴

The State has developed a process to ensure that death sentences are not disproportionate. As stated in the Commission's findings with respect to issue 4, the State's death penalty statute permits each defendant sentenced to death to request and receive both an individualized and a systemic review of the proportionality of his or her death sentence by the New Jersey Supreme Court. That provision was initially included in response to the United States Supreme Court's decision in Furman and was intended to determine each defendant's death worthiness as a protection against the arbitrary and capricious application of the death penalty. A defendant's death sentence is considered "disproportionate" if other defendants in the jurisdiction who have similar characteristics commit similar offenses and receive life sentences.

To determine whether a death sentence is disproportionate, the Court has adopted a system of statistical collection and analysis known as individual proportionality review, which can be briefly summarized as follows:

The system consists of two parts. The first part is frequency analysis, a statistical measure of the numerical frequency with which similar cases have resulted in sentences of death. The second part is precedent-seeking review, a traditional judicial way of comparing the files in similar cases to determine whether a defendant's death sentence is freakish or

²⁴Report entitled "A Review of the New Jersey AOC Narrative Case Summaries" prepared and submitted by Robin Glenn. The report can be found in the appendix to the transcript of the Commission's public hearing on October 11, 2006. Pages 2 and 5.

aberrational or the result of impermissible influences. In Re Proportionality Review Project, 161 N.J. 71,77 (1991).²⁵

The Court's individual proportionality review methodology is designed to diminish the extent to which subjectivity is part of the analysis of the case; however, the system does not alleviate the need for human judgment. As retired Superior Court Judge David S. Baime stated during his testimony before the Commission: "I don't want to leave the impression that the application of social science techniques is a silver bullet . . . In the end we have to expect that human judgment will come to bear."²⁶

To date, the Court has vacated two death sentences on the basis of individual disproportionality. In State v. Papasavvas, 170 N.J. 462 (2002), the Court vacated the death sentence of Peter Papasavvas, concluding after analyzing similar cases that Mr. Papasavvas was "singled out unfairly" for the death penalty." Id. at 495. Also, in State v. DiFrisco, 187 N.J. 156 (2006), the Court vacated the death sentence of Anthony DiFrisco in part based on proportionality review.

The effectiveness of the Court's individual proportionality review system has been questioned. In his prepared statement received by the Commission on August 16, 2006, retired Third Circuit Court of Appeals Chief Judge John J. Gibbons suggested that in the individual proportionality review context the Court's decisions are arbitrary: "[D]espite the court's effort to objectively quantify the process by what it calls (A) frequency analysis, and

²⁵ For a more detailed description of the Court's individual proportionality review methodology see Judge Baime's prepared statement submitted to the Commission which can be found in the appendix to the transcript of the Commission's Public Hearing on October 11, 2006.

²⁶ Oral testimony of Hon. David S. Baime to the New Jersey Death Penalty Study Commission. 11 October 2006. Pages 25 -26 of hearing transcript.

(B) precedent-seeking review, can the comparative selection on the basis of death worthiness ever be anything but arbitrarily comparative?”²⁷

Moreover, two members of the New Jersey Supreme Court have questioned whether the Court’s proportionality review jurisprudence adequately achieves the goal of consistency with respect to the application of the death penalty. Justice Alan B. Handler stated in his dissenting opinion in State v. Martini, 139 N.J. 3 (1994):

The deficiencies of design and application deprive proportionality review of whatever faint chance it might otherwise have had to provide constitutional legitimacy to the imposition of a death sentence. In short, as measured by notions of proportionality, the project of fairly and justly sentencing a defendant to death is doomed to failure. The Court’s proportionality review has, despite good intentions and prodigious work, become so unprincipled that its result-affirming a sentence of death—is intolerable in a society committed to procedural fairness and due process. Id. at 81-82.

After the Court modified the proportionality review model, Justice Virginia Long observed similar deficiencies in the Court’s newer approach to proportionality review in her dissenting opinion in State v. Timmendequas, 168 N.J. 20 (2001):

[O]ur proportionality review has fallen short of guaranteeing that the death penalty is fairly administered.

It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one

²⁷ Statement of Hon. John J. Gibbons to New Jersey Death Penalty Study Commission on August 16, 2006, which can be found in the appendix to the transcript of the Commission’s August 16, 2006 meeting. Pages 26-27 of hearing transcript.

grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution. The very exercise of individual proportionality review stands on a fundamentally unstable pediment. Id. at 52.

Based on the forgoing the Commission finds that despite the best efforts of the State, the risk remains that similar murder cases are being treated differently in the death penalty context thereby elevating the probability that the death penalty is being administered “freakishly” and arbitrarily. Given the finality of the punishment of death, this risk is unacceptable.

ISSUE 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

Commission's Finding: The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

The Commission notes that there have been no exonerations from death row in New Jersey in the 24-year history of the State's modern death penalty law. However, numerous exonerations in other states and exonerations in New Jersey in non-capital cases must be taken into consideration in weighing the risk of a mistaken conviction here.

Attorney Barry Scheck²⁸, Co-Director of the Innocence Project at Cardozo School of Law in New York, testified before the Commission that 182 individuals in the United States have been exonerated with post-conviction DNA testing, 14 of whom had been sentenced to death. Mr. Scheck noted that DNA testing cannot exonerate all innocent defendants, because it is available in only 10% of serious criminal cases. Other exonerations have been based on problems with other forms of forensic evidence which were ultimately found to not be valid, mistaken eyewitness identification, and false confessions.

²⁸ Oral testimony of Barry Scheck to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 17-24 of hearing transcript.

Kate Hill Germond²⁹, Assistant Director of Centurion Ministries in Princeton, testified that her organization has freed 35 innocent people from prison, including seven in New Jersey. She noted that “New Jersey has been at the forefront in protecting the rights of its citizens by evolving the way it examines, assesses and tries criminal cases” and urged the abolition of the death penalty as the next step in implementing protections for the innocent:

Abolishing the death penalty will not ensure [that] no innocent person will be convicted, but it would ensure that no innocent person will be killed by the State.

Larry Peterson³⁰ of Pemberton Township testified about his 1989 conviction for the brutal rape and murder of his neighbor, 25-year-old Jacqueline Harrison. Mr. Peterson was tried capitally and sentenced to life plus 20 years in prison. Although DNA testing was not available at the time of the murder, Mr. Peterson repeatedly sought the testing from prison after it became available. He finally prevailed when the Appellate Division ordered the testing in 2003. Based on DNA test results, Mr. Peterson was released from prison in 2005. On May 27, 2006, the prosecutor’s office announced that the State would not be able to sustain its burden of proof in a retrial and requested a dismissal of the indictment. According to press reports, Mr. Peterson was the 180th prison inmate nationwide to be released because of DNA testing, and his case is the first homicide conviction in New Jersey to be overturned on the basis of DNA evidence. He had spent 18 years in prison.

²⁹ Oral testimony of Kate Hill Germond to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 30-31 of hearing transcript.

³⁰ Oral testimony of Larry Peterson to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 16-17 of hearing transcript.

As Professor Lillquist³¹ noted:

The criminal justice system is a human system. It . . . involves decisions made by human beings, not by computers. And, inevitably, we make mistakes. Those who argue that we will never make a mistake in the criminal justice system in general and the death penalty process in general . . . are fooling themselves. Any criminal justice system, including the death penalty system, no matter how carefully we draw it, is going to make a mistake at some point.

Jennifer Thompson³² of Winston-Salem, North Carolina testified about her experience as a rape victim who wrongly identified her attacker. She was raped at knifepoint by an intruder in 1984 and during the rape made a conscious effort to memorize her attacker's face so that she could later identify him. Despite these efforts she mistakenly identified a man named Ronald Cotton as her assailant. Mr. Cotton was convicted and sentenced to life plus 50 years. He was exonerated in 1995 when DNA tests found that he could not have committed the assault; the DNA belonged to another man, Bobby Poole. According to Ms. Thompson, her mistake occurred because of a "contamination of memory": the composite sketch prepared by the police did not closely resemble her real assailant, but she became convinced that it depicted him accurately. When she was asked to choose from a photo line-up, she chose the photograph that best resembled the sketch, and it was a photograph of Mr. Cotton.

³¹ Oral testimony of Prof. Erik Lillquist to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 30-31 of hearing transcript.

³² Oral testimony of Jennifer Thompson to the New Jersey Death Penalty Study Commission. 27 September 2006. Pages 8-22 of hearing transcript.

She then chose Mr. Cotton from a physical line-up. Ms. Thompson told the Commission:

Some say that death row exonerations are rare enough that we should not end the death penalty because of innocence. Some say that with the proper procedures for eyewitness lineups and other precautions against wrongful convictions, you can reduce the risk to an acceptable rate. But I ask you: What is acceptable? . . . You can reduce, but you cannot eliminate, the risk of error in the death penalty system. No set of procedures can completely guard against human error.

The Commission notes that a similar eyewitness misidentification occurred in New Jersey. A black defendant was convicted of sexual assault of a white victim based solely on the victim's eyewitness identification of him eight months after the attack, when she happened to see him walking down the street. [*State v. Cromedy*, 158 N.J. 112 (1999).] No fingerprint evidence, DNA evidence or other forensic evidence linked him to the crime. The Supreme Court reversed the defendant's conviction, concluding that it was error to refuse a jury instruction on cross-racial identification when identification was the critical issue in the case. At trial the defendant's attorney had requested that the following language be included in the instructions to the jury: "[Y]ou know that the identifying witness is of a different race than the defendant. When a witness who is a member of one race identifies a member who is of another race we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification." The Supreme Court agreed, holding that a cross-racial jury instruction should be given when, as here, identification is a critical issue and an eyewitness's cross-racial identification is not corroborated by other evidence. The defendant had served five years in jail and was released after DNA testing excluded him.

In New Jersey, courts have recognized that a convicted person has the right to request DNA testing. See State v. Cann, 342 N.J. Super. 93, 103 (App. Div. 2001). The Legislature has also provided a procedure for DNA testing of defendants convicted in State court. See N.J.S.A. 2A:84A-32a. The statute provides mechanisms for a convicted person who can make the required showing to obtain a court order mandating DNA testing.

In recognition of the large number of exonerations across the country due to DNA evidence, Congress enacted the “Innocence Protection Act of 2004” (Title IV of the “Justice for All Act of 2004,” P.L.108-405) on October 30, 2004. The act establishes rules and procedures governing applications for DNA testing by inmates in the Federal system, requiring courts to order the testing if it has the scientific potential to produce new exculpatory evidence for the inmate’s claim of innocence. The act also created the “Kirk Bloodsworth Post-Conviction DNA Testing Program,” which authorized \$25 million to the states over five years to defray the costs of post-conviction DNA testing. (The program is named for Kirk Bloodsworth, the first death row inmate to be exonerated by DNA testing. Mr. Bloodsworth testified before the Commission about his experience³³.)

³³ Oral testimony of Kirk Bloodsworth to the New Jersey Death Penalty Study Commission. 27 September 2006. Pages 59-68 of hearing transcript.

ISSUE 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

Commission's Finding: The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

Family members of murder victims and other witnesses expressed a wide range of views in their testimony before the Commission. The overwhelming majority of witnesses testified that life without parole is the appropriate alternative to the death penalty.

Survivors who testified that they strongly support the death penalty included Marilyn Flax³⁴, whose husband Irving Flax was kidnapped and murdered by John Martini; Sharon Hazard-Johnson³⁵, whose parents Richard and Shirley Hazard were both murdered by Brian Wakefield in a home-invasion robbery; and Patricia Harrison³⁶, whose sister Jacqueline was murdered. (Martini and Wakefield are both on death row; Larry Peterson was convicted of Jacqueline Harrison's murder in 1989 and released in 2005 after DNA testing. Mr. Peterson also testified before the Commission.)

³⁴ Oral testimony of Marilyn Flax to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 134-136 of hearing transcript.

³⁵ Oral testimony of Sharon Hazard-Johnson to the New Jersey Death Penalty Study Commission. 19 July 2006, pages 9-15 and 13 September 2006, pages 172-185 of hearing transcript.

³⁶ Oral testimony of Patricia Harrison to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 17-20 of hearing transcript.

Marilyn Flax observed that the death penalty is intended only for “a select few” of the worst murderers, and stated that her husband’s killer is one of them. She requested that the Commission take note that anti-death penalty organizations do not speak for all victims.

What I would like this Commission to do is not change the law, but enforce the law. . . . The frustration [of] victims of crime is that it’s taking so long.

Sharon Hazard-Johnson stated that, because the death penalty has not been implemented in New Jersey, murderers in the State are making a mockery of the justice system. She noted that there is no doubt that the man convicted of her parents’ murders is guilty, as shown by the substantial DNA evidence, physical evidence, witness testimony and confessions in the case, and said that his execution should be carried out.

Patricia Harrison testified that the victims of her sister’s murder include herself, her five siblings, her parents, and her sister’s two daughters, and that their grieving will likely never end. She stated that the people who commit murder, including those in prison, continue to receive some enjoyment from life while her sister was denied that opportunity 19 years ago.

Those of you who are trying to be objective today should walk in my shoes or the shoes of the many living victims of this crime. Only then could you experience the unfairness and grief caused by missing a loved one while having the knowledge that the killer continues to enjoy life.

Several family members of murder victims shared the views of Jo Anne Barlieb³⁷, who testified before the Commission that she supports capital punishment for her mother's killer but reluctantly recognizes that a death sentence is unlikely to be carried out:

I'd support the death penalty if the State of New Jersey could limit the appeals process and actually utilize it. Unfortunately, I sit here following a more realistic approach in favor of abolition. I can testify from experience that our current system is most unjust for the victims and their loved ones. I can only hope to save other families from the grief of the never-ending appellate process.

Richard Pompelio³⁸, founder of the New Jersey Crime Victims' Law Center and father of a murder victim, testified that the death penalty is the greatest failing of the justice system in the State and that it revictimizes victims. He stated that the death penalty should be abolished in favor of life in prison without parole, and that the funds spent on the death penalty be used for services for homicide victims and funding for law enforcement.

I have absolutely no doubt that there will never be an execution in the State of New Jersey. . . . We are just sitting here playing with words and playing with taxpayers' dollars.

³⁷ Oral testimony of Jo Anne Barlieb to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 20-27 of hearing transcript.

³⁸ Oral testimony of Richard Pompelio to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 27-40 of hearing transcript.

A large number of family members testified that they oppose the death penalty on moral grounds. Lorry Post³⁹, the father of a murder victim, stated that life without parole should be substituted for the death penalty. The death penalty, he averred, just creates more killing, “and is a horrible thing which almost matches the horror of what some of us have lost by murder.”

Similarly, Molly Wiegel and her husband Bill Piper⁴⁰ testified that the issue of whether their mother’s killer should be executed caused conflict between family members and victimized them a second time. Mr. Piper specifically noted that he:

[S]pent three years in the emotionally untenable position of not only being opposed to and traumatized by the murder while being asked to participate in a state execution, but also of being morally obligated to speak out against the execution as a benefactor of the person who raped and murdered my 74-year-old mother. Not only did I feel violated by having been given both the responsibilities of executioner and rescuer, I can also say that giving victims the indirect power of revenge undermines the principle of government by law.

Vicki Schieber,⁴¹ mother of Shannon Schieber, a University of Pennsylvania graduate student murdered by a serial rapist, testified that there is a widespread assumption that victims’ families believe that only the death penalty can provide justice:

³⁹ Oral testimony of Lorry Post to the New Jersey Death Penalty Study Commission. 19 July 2006. Pages 27-30 of hearing transcript.

⁴⁰ Oral testimony of Molly Wiegel and William Post to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 78-84 of hearing transcript.

⁴¹ Oral testimony of Vicki Schieber to the New Jersey Death Penalty Study Commission. 13 September 2006. Pages 86-102 of hearing transcript.

These assumptions are so widespread and so unquestioned, that survivors who oppose the death penalty are sometimes questioned about their beliefs in a way that suggests, well, don't you want to have justice for your loved one?

I'm here to tell you that these assumptions are false. Many victims' family members oppose the death penalty for a variety of reasons. My husband and family represent this growing, and for the most part, underserved segment of the crime victim population. We believe the death penalty is harmful and already interferes with a difficult healing process. For us, that harm is exacerbated by our belief that responding to one killing with another does not honor our loved ones.

Honorable John J. Gibbons⁴², former Chief Justice of the United States Court of Appeals for the Third Circuit, concisely summarized the situation of the death penalty in New Jersey:

Twenty-four years after the enactment of the New Jersey death penalty statute, no one has been executed by the State of New Jersey, and there are only nine people on death row. The result in this state is that a sentence of death is in reality a sentence to incarceration in death row for decades, with the threat of execution overhanging the prisoner at all times, and the prolongation of painful uncertainty for the families of victims.

⁴² Oral testimony of Hon. John J. Gibbons to the New Jersey Death Penalty Study Commission. 16 August 2006. Pages 5-26 of hearing transcript.

The Commission agrees with the words of Mr. Post, who stated that the non-finality of death penalty appeals hurts victims, drains resources and creates a false sense of justice. Replacing the death penalty with life without parole would be a certain punishment, not subject to the lengthy delays of capital cases; it would incapacitate the offenders; and it would provide finality for victims' families.

ADDITIONAL FINDING

Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.

The Commission heard testimony about the trauma suffered by family members. Not only are survivors suddenly forced to deal with the shock of their loved ones' murders, but they must also navigate the criminal justice system. According to Kathleen M. Hiltner,⁴³ Executive Director for the Center for Traumatic Grief and Victims' Services in Moorestown:

The process is harmful and it's totally out of their control. Many become so focused on the criminal justice system in the trial that they do not even address their own or their families' needs until the trial is over. It's not uncommon for co-victims to fall apart emotionally and physically after the trial is over and justice is served. While many believe that the end of the trial brings closure, in reality, there is no closure. There is only the end of the trial. The grief continues.

For many, the future brings appeals and retrials and retraumatization. For co-victims in capital trials, experience tells us this is guaranteed to them. When a sentence is reduced or reversed, the survivor is again retraumatized. The criminal justice system focuses on the rights of the accused, not the survivor. As a result, survivors feel left out of the process and revictimized by the focus on the accused. They feel helpless . .

⁴³ Oral testimony of Kathleen M. Hiltner to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 92-96 of hearing transcript.

Ms. Hiltner stated that financial constraints made it impossible to assist all of the survivors who need counseling.

There are approximately 400 homicides every year in New Jersey, leaving an average of seven to 10 family members behind to endure its aftermath, yet our state lacks consistent long-term services for survivors.

Ms. Hiltner noted the shortage of services for homicide survivors:

Fortunately, throughout the 21 counties in New Jersey, there are state-mandated services available through agencies for all victims of sexual assault and domestic violence. Regrettably, similar services do not exist for survivors of homicide.

Janet Poinsett,⁴⁴ a therapist at the Center, testified that the trauma of losing a loved one to murder is persistent:

My focus is on the families and loved ones of the victim. Although trauma can be processed to lessen the effects of PTS, or post-traumatic stress, or PTSD, post-traumatic stress disorder, it does not go away. We at the center do speak of the '*new normal*.' Survivors are never the same but they can move on in their lives with the memories that they choose to hold near to them. It is an individual path and an individualized process A simple thing like picking up a newspaper can become a reinjury, possibly causing a panic attack or worse,

⁴⁴ Oral testimony of Janet Poinsett to the New Jersey Death Penalty Study Commission. 25 October 2006. Pages 96-102 of hearing transcript.

because an article highlights an upcoming trial or some reminder of the original trauma.

Ms. Poinsett noted that some victims may deny the extent of their own suffering.

[E]ven when individuals are traumatized and they are symptomatic, they quite often deny it. They wonder: 'What is wrong with me? Why can't I get over this?' – and other statements which minimize the impact of trauma. This is why I feel it is important to speak about trauma . . . But there is a difference between having gone through something horrible and being traumatized. There is a tendency, even for the loved ones who come to our center or call, to expect themselves to be able to move on, or get back to normal, or get closure. Their trauma is often disguised as lack of focus, lack of energy – 'I just can't seem to get it together.'

Reports range from full-blown panic attacks, startle responses or what is termed hyper-vigilance, to anger on a scale from mild to rage. There are many faces to the trauma and all of them hurt.

The Commission notes that a 1990 study conducted by the Medical University of South Carolina and funded by the National Institute of Justice⁴⁵ found that one in 10 adults in the United States has lost a family member, other relative or close friend to homicide. The study set out recommendations to reduce the likelihood that survivors would develop post-traumatic stress disorder, such as allowing survivors greater input into the criminal justice

⁴⁵ Kilpatrick, D.G., A. Amick, and H.S. Resnick: "Impact of Homicide on Surviving Family Members." Medical University of South Carolina, Department of Psychiatry and Behavioral Sciences. 1990. National Criminal Justice Reference Service. NCJ No. 130823.

system, providing appropriate training for mental health professionals and others who have contact with family members, and increasing the availability of peer support groups.

RECOMMENDATIONS

RECOMMENDATIONS

Based on our findings, the Commission recommends that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility. The Commission also recommends that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide.

Pursuant to subsection c. of section 2 of P.L.2005, c.321, the Commission has attached draft legislation embodying these recommendations.

RECOMMENDED LEGISLATION

AN ACT to allow for life imprisonment without eligibility for parole and to eliminate the death penalty, amending N.J.S.2C:11-3 and N.J.S.2B:23-10, repealing P.L.1983, c.245, and supplementing Title 2C of the New Jersey Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. N.J.S.2C:11-3 is amended to read as follows:

2C:11-3 Murder.

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. (1) Murder is a crime of the first degree but a person convicted of

murder shall be sentenced, except as provided in subsection c. paragraphs (2), (3) and (4) of this section subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced~~],~~ except as otherwise provided in subsection c. of this section,~~]~~ by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder ~~and who is not sentenced to death under this section]~~ shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

(4) ~~]~~ If the defendant was subject to sentencing pursuant to subsection c. and the jury or court found the existence of one or more aggravating factors, but that such factors did not outweigh the mitigating factors found to exist by the jury or court or the jury was unable to reach a unanimous verdict as to the weight of the factors, the defendant shall be sentenced by the court to a term of life imprisonment during which the defendant shall not be eligible for parole.

With respect to a sentence imposed pursuant to this subsection, the defendant shall not be entitled to a deduction of commutation and work credits from that sentence.] Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced by the court to life imprisonment without eligibility for parole, to be served at a maximum security prison, if a jury finds beyond a reasonable doubt that any of the following aggravating factors exist:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of subsection b. of N.J.S.2C:29-9;

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 in furtherance of a conspiracy enumerated in N.J.S.2C:35-3;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

(k) The victim was less than 14 years old; or

(l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2).

The aggravating factors relied on by the State in a given case must be

presented to the grand jury and alleged in the indictment. If the jury finds that no alleged aggravating factor has been established by the State but the defendant's guilt has been established under paragraph (1) or paragraph (2) of subsection a. of this section, the defendant shall be sentenced pursuant to subsection b. of this section.

(5) A juvenile who has been tried as an adult and convicted of murder shall be sentenced pursuant to paragraph (1) of this subsection.

c. **【Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced as provided hereinafter:】**

【(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.】

【(2) (a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the

establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.】

【(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating

factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.】

【(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of N.J.S.2C:29-9b.;

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 in furtherance of a conspiracy enumerated in N.J.S.2C:35-3;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

(k) The victim was less than 14 years old; or

(l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2).】

【(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.】

【(6) When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection. As used in this paragraph "victim and survivor evidence" may include the display of a photograph of the victim taken before the homicide.】 (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

d. 【The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.】 (Deleted by amendment,

P.L. , c.) (pending before the Legislature as this bill).

e. **【Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.】** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

f. **【Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.】** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

g. **【A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.】** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

h. **【In a sentencing proceeding conducted pursuant to this section, no evidence shall be admissible concerning the method or manner of execution which would be imposed on a defendant sentenced to death.】** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

i. **【For purposes of this section the term "homicidal act" shall mean conduct that causes death or serious bodily injury resulting in death.】** (Deleted by amendment, P.L. , c.) (pending before the Legislature as this bill).

j. In a sentencing proceeding conducted pursuant to this section, the display of a photograph of the victim taken before the homicide shall be permitted.

(cf: P.L.2002, c.26, s.10)

2. (New section) An inmate sentenced to death prior to the date of the passage of this bill, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole.

Such sentence shall be served in a maximum security prison.

3. (New section) A person convicted of murder under paragraphs (2), (3), or (4) of subsection b. of N.J.S.2C:11-3 shall be required to pay restitution to the nearest surviving relative of the victim. The court shall determine the amount and duration of the restitution pursuant to N.J.S.2C:43-3 and the provisions of chapter 46 of Title 2C of the New Jersey Statutes.

4. N.J.S.2B:23-10 is amended to read as follows:

2B:23-10. Examination of jurors. a. In the discretion of the court, parties to any trial may question any person summoned as a juror after the name is drawn and before the swearing, and without the interposition of any challenge, to determine whether or not to interpose a peremptory challenge or a challenge for cause. Such examination shall be permitted in order to disclose whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted in open court under the trial judge's supervision.

b. [The examination of jurors shall be under oath only in cases in which a death penalty may be imposed.] (Deleted by amendment, P.L. , c.)
(pending before the Legislature as this bill).
(cf: N.J.S. 2B:23-10)

5. P.L.1983, c.245 (C.2C:49-1 through 2C:49-12, inclusive) is repealed.

6. This act shall take effect immediately.

STATEMENT

This bill eliminates the death penalty in New Jersey and replaces it with life imprisonment without eligibility for parole, which sentence shall be served in a maximum security prison.

The bill amends N.J.S.2C:11-3 to remove the references to current subsection c. concerning the death penalty. Under the bill, murder generally would be punishable by a court to a term of 30 years, during which the person shall not be eligible for parole, or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole. There are certain provisions for

sentencing by a court to a term of life imprisonment during which the defendant shall not be eligible for parole.

These circumstances are:

(1) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer;

(2) If the murder victim is less than 14 years old and the act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 (sexual assault) or N.J.S.2C:14-3 (criminal sexual contact); or

(3) If certain aggravators exist.

An inmate sentenced to death prior to the date of the passage of this bill, upon motion to the sentencing court and waiver of any further appeals related to sentencing, will be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole. Such a sentence shall be served in a maximum security prison.

A person convicted of murder would be required to pay restitution to the nearest surviving relative of the victim when certain aggravators exist. The court will determine the amount and duration of the restitution.

The bill would also remove the reference to death penalty cases in N.J.S.A.2B:23-10 concerning examination of jurors.

The bill repeals chapter 49 of the criminal code which pertains to capital punishment and provides for procedures for carrying out death sentences.

It is the desire of the sponsor that any projected savings to be realized through the elimination of the death penalty be allocated to benefits and services for survivors of victims of homicide.

Eliminates the death penalty and replaces it with life imprisonment without eligibility for parole.

MINORITY VIEW

MINORITY VIEW

HONORABLE JOHN F. RUSSO

On August 6, 1982, Governor Thomas Kean signed the death penalty into law. The signing of Senate Bill No. 112, of which I was the sponsor, was the culmination of years of effort by myself and others to reestablish capital punishment in New Jersey. Similar bills I sponsored had on two previous occasions passed the Legislature only to be vetoed by Governor Brendan Byrne. On another occasion, legislation I sponsored to reestablish the death penalty passed the Senate but not the General Assembly.

Although I sponsored the State's current death penalty statute, my beliefs regarding capital punishment are not in any way influenced by pride of authorship. I was in favor of capital punishment long before I was first elected to the Senate in 1974. Neither are my beliefs on this issue motivated by the facts and circumstances of the murder of my father, who was killed in his home during the course of a robbery. The man who killed my father was not subject to the death penalty, nor do I believe he should have been based on the nature of the murder in that he did not go there with the specific intent to kill required under subsection c. of N.J.S.A.2C:11-3.

My goal in getting the death penalty legislation adopted was not to establish a system of wholesale executions, but rather to make the penalty of death available in cases of extraordinarily vile and heinous crimes. I believe in the words of Justice Potter Stewart in his opinion announcing the judgment of the United States Supreme Court in the case of Gregg v. Georgia, 428 U.S. 153 (1976) that:

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered

society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

‘The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law.’ Id. at 183. (citations omitted).

I knew when the bill passed that executions would be rare. In Ocean County, where I served as a prosecutor for ten years, there was one death penalty conviction between 1909 and 1967. But as Justice White stated in Furman v. Georgia, 408 U.S. 238, 312 (1972), the “legislative will is not frustrated if the penalty is never imposed.”

There are several issues raised by the majority report that warrant comment. First, I have never attempted to justify the death penalty on an empirical deterrence argument because it cannot be done. Studies since time immemorial have not resolved the issue of whether the death penalty deters murder. I have long suspected that the death penalty may be a deterrent for certain murders for hire and terrorism, but it cannot be proved. It also cannot be definitively disproved that the death penalty is a deterrent.

Second, I totally discount and do not consider the cost involved. The financial costs of capital punishment have been used both to justify and criticize the death penalty. I have heard many justify the death penalty on the grounds that the State should not have to spend thousands of dollars per year to maintain a convicted killer for the rest of his life. Conversely, the argument has often been made that trial and appellate costs that result from fair enforcement of capital punishment make it too expensive. Both of these arguments are utter and sheer nonsense. If the death penalty is wrong, it is wrong; if it is not wrong, it is not

wrong. It doesn't matter what it costs. The taking of a human life is something far too important to be influenced either way by costs.

Similarly, it has been said that the death penalty diverts resources from services for victims. Services for victims have nothing to do with the death penalty. Whether or not the State has the death penalty, victims of violent crime can and should be given appropriate services to cope with their loss.

Third, the majority cites to public opinion polling data to support its recommendation to abolish the death penalty. Although I do not concede that there is an emerging consensus against the death penalty,⁴⁶ my beliefs on the issue have never been motivated by popular opinion. In the late 1970's and early 1980's when I was working to reestablish the death penalty in New Jersey, there was a popular sentiment in favor of the death penalty. But I believed then as I believe now, that whether capital punishment is right or wrong does not depend on whether the winds are blowing in the right direction.

Fourth, New Jersey's 1982 death penalty statute has not been applied in a discriminatory fashion. The New Jersey Supreme Court has repeatedly rejected arguments that the administration of the death penalty is influenced by invidious racial bias.⁴⁷ If there was any evidence showing that race is a motivating factor in the death penalty in New Jersey, I would be the first to advocate its repeal, but no such evidence exists.

Fifth, the risk that New Jersey will execute an innocent person under the 1982 statute is minute. As the majority report clearly states: "there have been no exonerations from death

⁴⁶ As Patrick Murray, the expert relied on by the Majority, stated during his testimony to the Commission: "since 1999, support for the death penalty in principle . . . has hovered around 60 percent, six in ten New Jersey adults support the death penalty." Oral testimony of Patrick Murray to the New Jersey Death Penalty Study Commission. 13 Sept. 2006. Page 68 of public hearing transcript.

⁴⁷ See, e.g., State v. Harris, 165 N.J. 303, 344 (2000).

row in New Jersey in the 24-year history of the State's modern death penalty law."⁴⁸ Moreover, very few individuals on New Jersey's death row have even affirmatively proclaimed their innocence.

The possibility of executing an innocent person was a consideration at the time the bill was passed. In response, the bill was drafted very narrowly as to only apply to the worst criminals and afford each defendant the full opportunity to mount an effective defense and appeal his case to the State Supreme Court.

I concede that if the death penalty is going to be administered as it has been since 1982, it may need to be abolished. But I believe that the fundamental problem is not the statute, but rather liberal judges and other individuals who have consistently disregarded the legislative will and refused to enforce the law as written. Problems such as these should be identified and corrected before the State's capital punishment system is abolished. In other words, let's face up to whatever problems there are and correct them, not run from them by abolition.

In 1967, I prosecuted a man in a death penalty case. At the time of his conviction, when the jury recommended a verdict with no mercy, as it was then called, the judge had him immediately stand and read him those terrible words: "I command that you be taken on such a day" I fought for that conviction and I believed in it, but I had to go straight into chambers after the verdict and I stood there in tears. I fully understand the gravity of this issue, yet I remain convinced that the death penalty should be available for extreme cases such as for serial killers, terrorists, or in situations where an unpaid ransom results in the killing of a child.

I commend the Commission for its work over the past year. I have known the Chairman and several of the members for many years and have nothing but respect for each member of the Commission and the sincerity with which their beliefs on this issue are held.

⁴⁸ Report of the New Jersey Death Penalty Study Commission. Page 51.

However, based on my own deeply held convictions regarding capital punishment, I dissent from the Commission's findings and recommendations.

ADDITIONAL STATEMENTS

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STATEMENT OF THE ATTORNEY GENERAL

On January 2, 2007, the New Jersey Death Penalty Study Commission issued its final report, recommending the abolition of capital punishment in this state. The Attorney General, designated by statute as a member of the Commission, abstained from the Commission's vote.

This abstention is based upon the unique constitutional position the Attorney General occupies as the State's chief law enforcement officer – sworn to uphold the laws of New Jersey. Consistent with this obligation, the Attorney General's Office has defended the State's capital punishment law for the past two decades, and is obligated to continue to do so while it remains the law.

The law reflects a legislative consensus that capital punishment is an appropriate penalty in certain egregious circumstances. New Jersey's current statutory scheme complies with both the State and federal Constitutions, and it is not our prerogative or intention to frustrate the Legislature's will by suspending enforcement of a constitutional statute. Our responsibility is to uphold the law, and we will do so fairly and dispassionately, with appropriate regard to the constitutional rights of all.

For these reasons, we do not think it is appropriate to participate in the Commission's vote. Beyond the role of the Office of the Attorney General, however, our collective experience in prosecuting capital cases over the course of nearly a quarter century leads us to conclude that New Jersey's death penalty has not achieved its objectives. The current system does little to promote public safety, and forces the families of homicide victims to endure decades of painful litigation. We therefore would not oppose legislation that would repeal the death penalty, provided that the death penalty statute is replaced with a law that substitutes a sentence of life imprisonment without the possibility of parole for a capital sentence.

We recognize that this position might be misconstrued as acquiescence to some of the arguments offered by critics of capital punishment. That is not our intention or position. The evidence demonstrates that New Jersey's capital system has been applied fairly and that significant efforts have been made to limit capital prosecutions to the most aggravated cases. This outcome reflects our belief that prosecutors should not pursue capital cases in order to win in court. Rather, capital prosecutions should only be brought where there is powerful evidence of egregious criminal conduct, which convinces one to a moral certainty that the accused committed the offense.

The death penalty in this State has been the subject of intensive and persistent empirical study. While much data has been amassed, one simple statistic stands out: in the 24 years since capital punishment was reinstated in New Jersey, not one person has been put to death. The death penalty is irreversible, and that fact alone demands that the sanction be pursued with extraordinary care and circumspection. But delay and uncertainty in the imposition of a sentence undermine its deterrent effect. Also, when after so many years a sentencing option has never been used, it is difficult to characterize it as real.

Furthermore, we believe it unlikely that the sanction will be carried out in the future. The complexities of capital litigation, and the case law and review process that have developed, have rendered the death penalty effectively unavailable.

This pragmatic assessment matters greatly. If one accepts that an execution will not actually occur in this State, then the current complex and time-consuming death penalty construct offers no greater deterrence than the prospect of a sentence of life imprisonment without possibility of parole.

A careful evaluation of New Jersey's death penalty system must also account for its impact on victims. Article I, Paragraph 22 of the New Jersey Constitution expressly provides that the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide shall be treated with fairness, compassion and respect by the criminal

justice system. The present system frustrates those victims' survivors who seek the imposition of the death penalty, forcing them to endure decades of litigation in pursuit of a sanction not likely to occur. This is a heavy burden to ask survivors to continue to shoulder. In stating this, we recognize that victims' advocates are split on the question of whether to retain or abolish capital punishment in New Jersey, and that no one but a victim or victim's survivor is in a position to appreciate fully their tragic situation.

We would not be honest with victims or the general public if we ignored the practical realities of our capital sentencing scheme: the current capital punishment system in New Jersey diverts limited resources, does little to advance the interests of public safety, and subjects the families of homicide victims to protracted emotional grief and frustration. As a result, while we will continue to implement any constitutional sentencing system that the Legislature may adopt, we would offer no objection were the Legislature to replace the current capital punishment scheme with a law that substitutes a sentence of life imprisonment without the possibility of parole for a capital sentence.

* * *

We would like to express our gratitude to Chairman Rev. Howard and the other members of the Commission for their exemplary professionalism throughout the Commission's proceedings and deliberations on this important topic.

STATEMENT OF EDWARD J. De FAZIO

The County Prosecutors' Association of New Jersey concurs with the final recommendations of the Commission Report. A number of County Prosecutors do not share this position. However, it must be clearly stated that unless the Legislature amends the current statute, the County Prosecutors will continue to appropriately designate and effectively prosecute death penalty eligible murder cases. That is our sworn duty as individual County Prosecutors.

We commend our Chairman, fellow Commissioners and staff for all their work in the formulation of this critical report.

STATEMENT OF THE PUBLIC DEFENDER ON THE ISSUE OF MANDATORY LIFE WITHOUT PAROLE

The New Jersey State Office of the Public Defender embraces the recommendation of the Death Penalty Study Commission that the death penalty be abolished in New Jersey. Since 1982, the Public Defender's Office has dedicated itself to providing the highest level of legal representation to its clients facing the death penalty at both the trial and post-conviction stages. In the process, our attorneys have long been aware of many of the problems in New Jersey's failed system of capital punishment.

Nevertheless, I am compelled to take issue with the proposed statutory amendments recommended by the Commission that would mandate the imposition of life without the possibility of parole in countless cases in which the death penalty would never otherwise be imposed. Under the guise of "replacing" the death penalty with life without parole, the proposed statutory scheme goes well beyond the Commission's stated objective by inevitably capturing many cases that never would have been prosecuted capitally or resulted in death verdicts. In order to truly "replace" the death penalty with life without parole, the scheme implemented must result in the imposition of life without parole in roughly the same number of cases in which the death penalty has to this point been imposed. If not, one is not "replacing" the other.

The fundamental problem is that imposition of the death penalty, unlike imposition of life without parole under the proposed model, requires the weighing of mitigating factors once the State has proven at least one aggravating factor needed to render a murder defendant subject to the death penalty. In other words, the death penalty is not and cannot constitutionally be made mandatory on proof of an aggravating factor alone. The sentencer (either judge or jury) is required to consider mitigating factors offered by the defendant and must then exercise its discretion to determine if death is the appropriate punishment. Under the Commission's recommended procedure, imposition of life without parole is mandatory upon a finding of an aggravating factor, there is no opportunity for the defendant to offer mitigating factors, and there is no discretion on the part of the sentencer.

Needless to say, the number of defendants sentenced to life without parole will be far greater than the number currently being sentenced to death. That has been the experience in other States in which life without parole has been enacted in lieu of the death penalty. If that is the Commission's goal, it should say so rather than making the claim that the goal is merely "replacement" of the death penalty with life without parole. If the Commission's goal is in reality to "replace" the death penalty with life without parole, it should recommend a scheme in which the sentencer has the discretion to identify those cases in which life without parole is not appropriate even if an aggravating factor exists.

Such a scheme could easily be developed by making the imposition of life without parole discretionary with the judge at the time of sentencing once a jury has found at least one aggravating factor. This is precisely that which is proposed in Senate Bill #171 introduced by Senator Lesniak. If, in a particular case, the judge believes that life without the possibility of parole is not appropriate, he or she will be required to impose a sentence of 30 years to life with a mandatory period of parole ineligibility for 30 years. In addition, the No Early Release Act would apply to insure that the defendant serve 85% of the sentence imposed up to 63.75 years for a life sentence. There can be no legitimate claim that such a statute would fail to provide sufficient sentencing options to our judges.

The reality is that, if the death penalty were simply abolished with no other changes to the homicide statute, life without parole is, for all practical purposes, already on the books. A life sentence in New Jersey carries a period of parole ineligibility of 63.75 years. Even an 18 year old convicted murderer can be incarcerated until age 81 under current law. I recognize, however, that a stated sentence of life without the possibility of parole has some symbolic meaning to many. Life without parole is already mandated in New Jersey for the murder of a police officer and for the murder of a child under 14 during sexual assault. To expand unnecessarily the categories of cases in which discretion is totally removed from the sentencing equation would be a grave mistake.

I am particularly concerned about the potential for abuse that exists from the application of the felony murder aggravating factor. The felony murder factor makes it a capital offense to commit a knowing and purposeful murder during the commission of robbery, burglary, sexual assault, kidnapping, arson and carjacking. The vast majority of these cases are not prosecuted capitally. Even when they are, they infrequently result in death verdicts because jurors attribute lesser weight to this aggravating factor in relation to the mitigating factors offered by the defendant. Mandatory imposition of life without parole in every such case is the most troublesome example of how the Commission's proposed statute goes beyond the mere "replacement" of the death penalty with life without parole. The Commission should recommend elimination of the felony murder aggravating factor even if it insists on the model of mandatory life without parole.

An excellent example of this aspect is the New Jersey Supreme Court decision in State v. Papasavvas, 170 N.J. 462 (2002) in which defendant's death sentence was overturned on proportionality grounds. Papasavvas had broken into the victim's home and murdered her. The only aggravating factor found in the case was the felony murder factor (murder during robbery and burglary). The Court compared the case to numerous others with similar fact patterns in which the death penalty was not imposed and concluded that defendant's death sentence was disproportionate. Under the scheme recommended by the Commission, all of these cases could have been easily and successfully prosecuted as life without parole cases even though the only one in which a death sentence was returned was deemed to be disproportionate.

I recognize that prosecutors would have discretion under the Commission's model not to seek life without parole in certain cases even if aggravating factors apply to the alleged facts. However, most of the factors that would typically weigh against seeking the death penalty would be diminished with the new system. It would be so simple to go forward with a life without parole case relative to a capital case that the decision would be easy. Issues like resource allocation, length of trial, the presence of mitigating factors, the likelihood of obtaining a death verdict, and the lack of finality in the process would all disappear. The so-

called sentencing phase would be a formality in almost every case because the State would have presented its proofs and there would be no opportunity for the defendant to offer mitigating factors as in a capital case. In the context of the felony murder aggravating factor, for example, the jury would have already found the defendant guilty of murder, robbery and felony murder. In reality, there would be no issue left to deliberate.

The Commission has also failed to adequately consider other long term ramifications of its proposed scheme. I have previously circulated the Mauer Report prepared through the Sentencing Project which highlights several issues. Increased use of life without parole as a sentence has significant fiscal ramifications as individuals are incarcerated for longer and longer periods of time. The long run costs associated with an increased number of prisoners serving life without parole may very well offset the cost savings of abolishing the death penalty. Rising health care costs for aging prisoners is already becoming an issue in the era of mandatory periods of parole ineligibility. Disparities in race and class will inevitably seep into the system as poor minority urban dwellers are disproportionately included in the group of defendants subjected to mandatory life without parole. One need only look as far as the racial disparities existing in New Jersey's prison population as a result of the school zone drug law and the disparities in the Federal prison population as a result of the Federal Sentencing Guidelines and mandatory sentences. The Commission's proposed scheme also ignores compelling statistics demonstrating the lower rate of recidivism found in older inmates commonly referred to as "aging out". The public safety is simply not put at risk in the same manner by the release of prisoners in their 50's, 60's and 70's.

I hope that the Legislature acts on the Death Penalty Commission Report and abolishes the death penalty. At the same time, however, I hope that it does so without creating a whole new set of problems by insisting on the political quid pro quo of a mandatory life without parole scheme for a far too broad class of cases. Abolition of the death penalty is in the best interest of New Jersey's system of justice. Adoption of a system of mandatory life without parole as recommended by the Commission is not.

STATEMENT OF COMMISSIONER KATHLEEN M. GARCIA

It has been an honor and privilege for me to be among the distinguished individuals who served on the Death Penalty Study Commission.

As the surviving family member of a homicide victim who has spent the last two decades advocating for the rights of crime victims, I am well aware of the issues involved in what has often been described as "New Jersey's failed system of capital punishment."

It is my own personal opinion, as well as the position of the victim's right community as a whole, that our capital punishment system has served those charged and convicted of capital murder very well; however, it has failed miserably to serve the law abiding citizens of New Jersey – most importantly the survivors of murder victims.

It has long been evident that the New Jersey Supreme Court will continue to ensure that no person, regardless of how horrendous the crime(s) committed, will ever be executed. A portion of the testimony by Richard Pompelio, Esq., Founder of the New Jersey Crime Victim's Law Center and father of a murdered son, describes the situation well:

"The death penalty process in New Jersey over the past quarter century has been the greatest failing of the justice system in the history of our State. It is the failing of those in power, the politicians and the judges – but it is a failing that has been spawned from good and righteous intentions, and also pride, a pride on the part of these people in power to do what they believe is right. The system can no longer suffer the pride of those in power. The taxpayers can no longer bear the cost of this failure. And as for the victims [survivors] – enough is truly enough."

Illogical rulings by the Supreme Court over the years have resulted in victims/survivors losing all faith in our system of justice. In the State vs. Jackson, for example, the Court applied the Gerald rule which, in essence, found the jury's decision was not clear as to whether the perpetrator intended to kill his victim or just cause bodily injury –

even though, in the words of the state, the defendant stabbed the victim wildly, viciously, repeatedly, 53 times – including 18 stab wounds to the genital area.

Other capital cases, such as the case of Joey “Jaquinto” Hightower for the murder of Cynthia Barlieb in 1985, have been overturned several times due to insignificant technicalities – forcing survivors to endure years of endless appeals and multiple trials. Each ruling and subsequent legal process has a tremendous emotional, physical, and often financial impact on surviving family members of the victim.

I agree with Senator Russo’s opinion that “the fundamental problem is not the statute, but rather liberal judges and other individuals who have consistently disregarded the legislative will and refused to enforce the law as written.” Nevertheless, wishing for the Supreme Court to do an “about face” will not make it so – and refusing to accept this fact ensures that survivors will continue to suffer as a result of this unjust process.

Expecting the Supreme Court to declare the death penalty unconstitutional, as some have suggested, is also not the answer – especially since doing so would serve as another slap in the face for victims and survivors by the system.

As I made perfectly clear throughout the study process, I personally support the death penalty and I have openly stated, “I have as much compassion for these perpetrators as they had for their unfortunate victim(s).” However, I and other advocates, who have been in the trenches for many years, can bear witness to the agony of survivors forced to endure the capital punishment system in our State and recognize the need to end what has become a “joke” in New Jersey.

It was heartbreaking to hear the testimony of Mrs. Flax, whose husband was murdered by John Martini in 1989 and Sharon Hazard-Johnson, whose elderly parents were both murdered in 2001. Mrs. Flax and Ms. Hazard-Johnson are under the impression that the person who killed their loved ones will one day be executed. Seasoned advocates, however,

realize this will probably never happen. Rather than an execution, the likely outcome for such families is one or more trials many years after the initial death verdict, encumbered by the loss of key witnesses due to death or fading memories of the event.

When we consider there have been capital cases in other parts of the country where DNA analysis has exonerated some inmates and New Jersey has failed to execute anyone in decades, the resurrection of executions here is improbable.

We often hear the terminology “cruel and unusual punishment” associated with the death penalty and perpetrators. While reasonable people may debate this issue, there is no question to those who have watched the process in action as victim advocates, that the capital punishment system in our State is cruel as it applies to the surviving family members of the victim.

I was pleased to see so many members of the Commission, who were survivors themselves, publicly acknowledged their own personal tragedy. The feelings of Commissioners who had lost a loved one to criminal homicide about the death penalty mirrored those of the survivors who attended and testified during the public hearings. While they had opposing viewpoints about the morality of the death penalty, most were able to look beyond their own position and see that survivors from both groups were suffering as a result of its continued “existence.”

One act of courage was displayed by Justice Coleman during the public hearings. I believe it was at the conclusion of the testimony provided by JoAnne Barlieb about her mother’s murder when she was 8-years-old and how nearly two decades of appeals impacted her and her three younger sibling’s lives. Justice Coleman was forthright enough to make an observation about the capital punishment system in New Jersey that may not have been picked up by the stenographer and reflected in the transcripts. He said, and I am paraphrasing, “It seems like the system is working too well.”

During her testimony, Ms. Barlieb bluntly acknowledged much of the anger that has consumed her young life has stemmed not just from the crime itself, but due to what the capital punishment system did to her and her family. She has obtained no sense of justice, since the perpetrator who murdered her mother not only escaped execution, but she will actually face the day that he will be released from prison.

While Professor Blecker's testimony indicated the death penalty statute was of value even if it is never carried out, there can be no sense of justice for survivors if the sentence they receive and embrace, no matter what that may entail, is never served.

I believe it has taken real courage from all those who advocated for the formation of this Commission, as well as the thirteen people with varying viewpoints and experiences who came together and honestly examined the practicality of our capital punishment system. While members of the Commission who voted for abolishment did not totally agree on any other single point, I believe I can say with confidence that we were all united in our finding that the death penalty statute in New Jersey is harmful to survivors.

In conclusion, I commend Chairman Howard for his leadership, Justice Coleman for his gentle guidance, and the entire Commission and staff for their sincere dedication to this important endeavor.

I fully support the Commission's recommendation to abolish the death penalty. For the sake of all survivors, I hope we will witness great courage by our legislators, as well as others, through their active support of legislation reflecting the Commission's findings and recommendations.

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LETTERS TO THE COMMISSION:

Honorable Bill Baroni, Assemblyman, District 14. October 27, 2006.

Celeste C. Fitzgerald. August 14, 2006.

Gunnar and Joyce Marsh, Wentzville, Missouri. September 7, 2006.

Honorable Robert J. Martin, Senator, District 26. October 30, 2006.

Rev. Carroll L. Pickett, Montgomery, Texas. July 2006.

E-MAIL TO THE COMMISSION:

Robert Black. July 30, 2006.

Celeste Fitzgerald. November 3, 2006.

September 5, 2006.

Dr. Laura Schafer. November 27, 2006.

LETTERS TO THE COMMISSION SUPPLEMENTING PREVIOUS TESTIMONY:

Robert Blecker, Professor of Law, New York Law School. October 24, 2006.

John P. (Jack) Callahan, Private Citizen. October 2006.

Celeste Fitzgerald, Program Director, New Jerseyans for Alternatives to the Death Penalty. November 1, 2006.

Wanda D. Foglia, J.D., Ph.D., Professor of Law and Justice Studies, Rowan University. October 17, 2006.

Michele Warner Hammel, Director, Office of External Affairs, on behalf of Acting Commissioner George Hayman, Department of Corrections. October 26, 2006.

Barry C. Scheck, Esq., Co-Director, Innocence Project. October 18, 2006.

POSITION PAPER:

The Association of Criminal Defense Lawyers of New Jersey. July 13, 2006.

BRIEFS:

The Association of Criminal Defense Lawyers of New Jersey, The American Civil Liberties Union of New Jersey, and New Jerseyans for a Death Penalty Moratorium.

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PUBLIC HEARING WRITTEN TESTIMONY:

July 19, 2006

Statement by Most Reverend John M. Smith, Bishop of the Catholic Diocese of Trenton.

Statement by Catholic Bishops of New Jersey: Most Reverend John J. Myers, Archbishop of Newark; Most Reverend Joseph A. Galante, Bishop of Camden; Most Reverend Andrew Pataki, Bishop of the Byzantine Catholic Eparchy of Passaic; Most Reverend Joseph Younan, Bishop of Our Lady of Deliverance Diocese; Most Reverend Paul G. Bootkoski, Bishop of Metuchen; Most Reverend Arthur J. Serratelli, Bishop of Paterson; Most Reverend Edgar M. da Cunha, Auxillary Bishop of Newark; Most Reverend Thomas A. Donato, Auxillary Bishop of Newark; Most Reverend John W. Flesey, Auxillary Bishop of Newark.

Statement by Sharon Hazard-Johnson including the following attachment: Sharp, Dudley. "The Death Penalty as a Deterrent-Confirmed-Seven Recent Studies." Justice Matters, Updated: November 12, 2004.

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Statement by Reverend Jack Johnson, The New Jersey Council of Churches.

Statement by Richard C. Dieter, Executive Director, Death Penalty Information Center, Washington, D.C.

Statement by Mathew B. Johnson, Ph.D., Associate Professor of Psychology, John Jay College of Criminal Justice, Peoples' Organization for Progress and the following article: Gil, Johnson, and Johnson. "Secondary trauma associated with state executions: testimony regarding execution procedures." 34 J. Psych & Law 25, Spring 2006.

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Statement by Edith Frank, Director, League of Women Voters of New Jersey and message from Mary G. Wilson, President, League of Women Voters of New Jersey.

Statement by Marilyn Zdobinski, Esq. and statement by Marilyn Flax.

Statement by Dr. Robert Johnson, Professor, Department of Justice, Law and Society at American University, Washington, D.C.

Statement by Alisa Mariani, Vice President, Somerset County Chapter, American Civil Liberties Union of New Jersey.

September 13, 2006

Statement by Senator Raymond J. Lesniak.

Statement by Sandra Place.

Statement by Patricia Harrison.

Statement by Jo Anne Barlieb.

Statement by Richard Pompelio, New Jersey Crime Victims' Law Center.

Statement by Robert J. Del Tufo.

Statement by Patrick Murray and the following report: "Public Opinion on the Death Penalty in New Jersey." 15 August 2006, prepared for New Jerseyans for Alternatives to the Death Penalty.

Statement by Vicki Schieber.

Statement by Juan Roberto Melendez-Colon.

Statement by Daniel J. Carluccio, Esq.

Statement by Marilyn Zdobinski and statement by Marilyn Flax.

Statement by Jonathan E. Gradess, Executive Director, New York State Defenders Association.

Statement and article by Sharon Hazard-Johnson, "Murder Victim's Daughter Speaks Out." The Press of Atlantic City 27 June 2004.

Statement by Brian Kincade, Esq.

Statement by Anna "Cuqui" Rivera, Latino Leadership Alliance of New Jersey.

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September 27, 2006

Statement by Bill Babbitt, Member, Board of Directors Murder Victims' Families for Human Rights.

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Statement by Ken Wolski.

Statement by Marilyn Zdobinski, Esq.

October 11, 2006

Statement by Honorable David S. Baime, J.A.D., Retired, Special Master for Proportionality Review.

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Statement by Kent Scheidegger, Legal Director, Criminal Justice Legal Foundation.

Statement by Sam Millsap, Former Prosecutor from San Antonio, Texas.

Statement by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, Executive Director, Charles Hamilton Houston Institute for Race and Justice, Harvard Law School.

Statement by Gary J. Hilton, Sr., Former Acting Commissioner of the New Jersey Department of Corrections.

Statement by Robert Johnson, Professor of Justice, Law and Society, American University.

Statement by Molly Weigel.

Statement by Kathleen M. Hiltner, Executive Director, Center for “Traumatic Grief and Victim Services”.

Statement by Janet Poinsett.

Statement by David Shepard.

Statement by Bryan Miller.

Statement by Kathryn Schwartz.

Statement by Bishop E. Roy Riley, New Jersey Synod, Evangelical Lutheran Church in America.

Statement by David A. Ruhnke, Esq.

Statement by Clare Laura Hogenauer.

Statement by Honorable Joseph Azzolina.

Statement by Marilyn G. Zdobinski.

Statement by Sharon Hazard-Johnson.

WORKING SESSION

August 16, 2006

Power Point presentation by R. Erik Lillquist, Professor, Seton Hall University School of Law, "Death Penalty Justifications and Procedural Improvements".

Statement by Honorable John J. Gibbons, Former Chief Judge, United States Court of Appeals, Third Circuit.

Statement by Joseph K. Krakora, Esq., Director, Capital Litigation, New Jersey Office of the Public Defender.

APPENDIX

ABOUT THE MEMBERS OF THE COMMISSION

REVEREND M. WILLIAM HOWARD, JR., CHAIRMAN

Dr. Howard has served as pastor of Bethany Baptist Church in Newark, New Jersey since May, 2000. From 1992 to 2000, Dr. Howard was President of New York Theological Seminary. Prior to that Dr. Howard was a member of the national staff of The Reformed Church in America; Moderator of the Programme to Combat Racism of the World Council of Churches; President of the National Council of Churches; and President of the American Committee on Africa.

Dr. Howard is a graduate of Morehouse College and Princeton Theological Seminary. He is a member of the Board of Governors of Rutgers University and a member of the Council on Foreign Relations. His prior voluntary board service includes the National Urban League and the Children's Defense Fund, among others.

JAMES P. ABBOTT

James P. Abbott is the Chief of Police in West Orange, New Jersey. He received his Bachelor of Arts from Kean College in 1982 and Master of Arts from Seton Hall University in 1990. He is a graduate of Northwestern University's Executive Management Program, West Point Command and Leadership Program, the FBI Law Enforcement Executive Development Seminar at Quantico, Virginia and the New Jersey Executive Police Institute at Fairleigh Dickinson University. He is an active member of the Police Executive Research Forum, the International Association of Chiefs of Police, the National Association of Chiefs of Police, the New Jersey State Association of Chiefs of Police and the Immediate Past President of the Essex County Chiefs of Police Association.

HONORABLE JAMES H. COLEMAN, JR.

Honorable James H. Coleman, Jr. served on the New Jersey Supreme Court from 1994-2003. He has served as Presiding Judge of the New Jersey Superior Court, Appellate Division (1987-1994), Judge of the Appellate Division (1981-1987), Judge of the Superior Court, Law Division (1978-1980), Judge of the Union County Court (1973-1978) and Judge in the New Jersey Workers' Compensation Court (1964-1973). He received his B.A. from Virginia State University in 1956 and J.D. from Howard University School of Law in 1959. Justice Coleman holds Honorary Doctor of Laws from Virginia State University, Widener University and Essex County College.

Justice Coleman is currently Of Counsel to Porzio, Bromberg & Newman, P.C. in Morristown, New Jersey.

EDWARD J. DE FAZIO

Edward J. De Fazio is the Hudson County Prosecutor. He is a lifelong resident of Hudson County. He graduated from Fordham University, Bronx, New York in 1974 and received his Juris Doctorate

degree from Seton Hall Law School in 1978. Prosecutor De Fazio is admitted to practice law in New Jersey, New York and before the United States Supreme Court. His legal career began as an Assistant Hudson County Prosecutor in 1978 until his appointment as the Chief Judge of the Jersey City Municipal Court in 1989. He returned to the Hudson County Prosecutor's Office in 1991 as the First Assistant where he was in charge of the day-to-day operations of the legal staff. From 2001 to 2002 Prosecutor De Fazio served as a Superior Court Judge for the State of New Jersey. He left the bench on July 29, 2002 to assume the position of Hudson County Prosecutor.

Prosecutor De Fazio manages an office of approximately 285 legal, investigative and support personnel responsible for the prosecution of all criminal and juvenile delinquency matters initiated in Hudson County. Prosecutor De Fazio is a member of the New Jersey and the Hudson County Bar Associations. He is a member and past president of the North Hudson Lawyers' Club. Prosecutor De Fazio has also been selected to receive the 2006 Professional Lawyer of the Year Award for Hudson County. Prosecutor De Fazio is a member of the New Jersey Parole Board Advisory Commission. He has served as the State Director to the Board of the National District Attorneys' Association since 2004.

KATHLEEN GARCIA

Kathy Garcia has extensive experience working with co-victims of homicide. She has been involved in the victims' rights and services field since the 1984 murder of her nephew. She is a Trustee for the New Jersey Crime Victim's Law Center, located in Sparta. She is also the Founder and Program Director of the Center For Traumatic Grief And Victim Services, based in Moorestown, a non-profit organization providing comprehensive services to those impacted by sudden death and violent crime.

Ms. Garcia served on the Board of Directors of the New Jersey Coalition For Crime Victims' Rights, which successfully lobbied to amend the State Constitution in 1991 to add a provision concerning the rights of crime victims. She also served on the Citizens' Advisory Council to the Chairman of the New Jersey Victims of Crime Compensation Board and has been an instructor for the Burlington County Police Academy since 1999.

KEVIN HAVERTY

Kevin Haverty is an attorney in private practice with the law firm of Williams Cuker Berezofsky in Cherry Hill. He is a 1981 graduate of Rutgers University with a B.A. in Political Science and graduated with high honors from Rutgers Law School in Camden in 1992 where he was a staff and articles editor on the Rutgers Law Journal. In addition to his private practice, from 1994 to 1997 he taught Legal Research and Writing at Rutgers-Camden as a part-time adjunct professor and has been involved in several precedent-setting cases before the appeals courts of this state and federal district court. He has also been a lecturer on numerous occasions on various aspects of substantive and procedural law in New Jersey.

EDDIE HICKS

Eddie Hicks resides in Galloway Township NJ. He lost his oldest daughter to murder in 2000. He retired from the Atlantic City Fire department after 25 years of service. He is a Marine Corps veteran.

He is a member of Murder Victims Families for Reconciliation (MVFR). He is a volunteer for the Department of Correction's Focus on the Victim program. He is a past Volunteer for the Superior Court of New Jersey on the Juvenile Conference Committee, Atlantic County. He is a Past President of the Atlantic City Chapter of the International Association of Black Professional Firefighters.

THOMAS F. KELAHER

Thomas F. Kelaher is currently Ocean County Prosecutor, confirmed by the N.J. Senate in 2002. He was a senior partner in the law firm of Kelaher, Garvey, Ballou and Van Dyke in Toms River. He graduated with a B.A. in Business Administration in 1954 from St. Peter's College and received his J.D. from Seton Hall University School of Law in 1960. He is a certified Civil Trial Attorney.

In 1963, New Jersey Governor Richard J. Hughes appointed him as Deputy Attorney General, served as an Assistant Ocean County Prosecutor from 1969 to 1974 and later served as an Ocean County municipal prosecutor for numerous municipalities. He has served as President of the Ocean County Bar Association, Chairman of its Ethics Committee, criminal law instructor for the Ocean County Police Academy from 1969 to 1996, member of the Electronic Recording of Confessions committee appointed by the Chief Justice of the N.J. Supreme Court, and Chairman of the Ocean County Jail Study Commission. He is admitted to practice before the N.J. Supreme Court, U.S. Supreme Court and U.S. Court of Military Appeals. In 2004-2005 served as President of the Prosecutors Association of N.J. and member of its Ethics Committee.

Prosecutor Kelaher is a retired Lt. Colonel from the United State Marine Corps Reserve (1979).

HONORABLE STUART RABNER

As the chief law enforcement officer in the State, Stuart Rabner oversees the Division of Criminal Justice, the New Jersey State Police, the Division of Consumer Affairs and the Division of Civil Rights, in addition to overseeing seven other agencies that are part of the department. He is also the chief legal representative to all other departments in State government through the Division of Law.

Mr. Rabner served in the U.S. Attorney's Office in Newark from September 1986 to December 2005. He was chief of the criminal division when he left to join the Corzine administration. Previously, he was first assistant U.S. attorney, executive assistant U.S. attorney, chief of the terrorism unit, and deputy chief of the special prosecutions division.

Mr. Rabner graduated summa cum laude in 1982 from the Woodrow Wilson School of Public and International Affairs at Princeton University. He graduated cum laude from Harvard Law School in 1985.

HONORABLE JOHN F. RUSSO

Honorable John F. Russo, Sr., served as New Jersey Senate President from 1986 to 1989 and as Acting Governor on many occasions. He represented Ocean County's 10th District in the Senate from 1974 to 1992. Senator Russo served as Majority Leader in 1978 and again in 1984 and 1985 and was the primary

sponsor of New Jersey's death penalty law, which was enacted in 1982. Senator Russo was a prosecutor in Ocean County for ten years. He is a 1955 graduate of Notre Dame University with honors and received his Juris Doctor from Columbia University in 1958.

Senator Russo is a member of the Board of Governors of Rutgers University. He is a partner in the Princeton Public Affairs Group, Inc.

RABBI ROBERT SCHEINBERG

Rabbi Robert Scheinberg is the rabbi of the United Synagogue of Hoboken. He is an adjunct instructor of Liturgy at the Jewish Theological Seminary and the Academy for Jewish Religion. Rabbi Scheinberg was a Wexner Graduate Fellow at the Jewish Theological Seminary, where he was ordained and where he is a doctoral candidate in Jewish liturgy. He is active in civic affairs in Hoboken and throughout Hudson County.

YVONNE SMITH SEGARS

As New Jersey's Public Defender, Yvonne Smith Segars oversees an agency of 1,300 employees, including over 500 staff attorneys and the services of over 500 outside counsel. The Office of the Public Defender provides a multitude of services to indigent adults and juveniles, particularly in the area of criminal defense.

Prior to her appointment, Public Defender Segars served as the First Assistant Deputy Public Defender for the Office of the Public Defender in the Essex Region. Ms. Segars serves as Vice-Chair of the New Jersey Commission to Review Criminal Sentencing. She is also a member of the Chief Defender Policy Group of the National Legal Aid and Defenders Association, Member of the Board for the Office of Child Advocate, a member of the Governor's Cabinet for Children and a member of the Criminal Disposition Committee. In addition she serves as a core faculty member for the Justice Management Institute, the National Association of Drug Court Professionals and the National Drug Court Institute.

Ms. Segars received her J.D. from Rutgers School of Law, Newark, and her B.A. in psychology from Kean University.

MILES S. WINDER, III

Miles S. Winder III is an attorney in private practice in Bernardsville, New Jersey. He graduated from Oberlin College in 1969 and received his Juris Doctor degree from University of Denver College of Law in 1972. He currently serves on the New Jersey State Bar Association Board of Trustees. He has previously served as President of the Somerset County Bar Association, Chair of the Real Property Probate and Trust Law Section of the New Jersey State Bar Association, and Chair of the District XIII Ethics Committee.

ACKNOWLEDGEMENTS

COMMISSION STAFF

Office of Legislative Services
Judiciary Section

The Commission also wishes to acknowledge and thank the following offices, units and persons from the New Jersey Office of Legislative Services for their assistance to the Commission in its work.

OFFICE OF PUBLIC INFORMATION

ADMINISTRATIVE UNIT

CENTRAL MANAGEMENT UNIT

DATA MANAGEMENT UNIT

Recognition to the Hearing Reporter Unit; Susan Swords, Acting Coordinator. Special appreciation to Ms. Brokaw, Ms. Sapp and Ms. Robbins for expeditious production of transcripts. Thanks to the OLS Library; Peter J. Mazzei, Manager, Library Services.

Special appreciation to Judiciary Section members for assistance rendered at hearings and meetings with particular appreciation to Nina Riccardi for managing the production of this report.

ENABLING LEGISLATION OF THE COMMISSION

P.L. 2005, 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.

CURRENT MURDER STATUTE
N.J.S.A. 2C:11-3

2C:11-3. Murder.

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. (1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced, except as otherwise provided in subsection c. of this section, by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder and who is not sentenced to death under this section shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

(4) If the defendant was subject to sentencing pursuant to subsection c. and the jury or court found the existence of one or more aggravating factors, but that such factors did not outweigh the mitigating factors found to exist by the jury or court or the jury was unable to reach a unanimous verdict as to the weight of the factors, the defendant shall be sentenced by

the court to a term of life imprisonment during which the defendant shall not be eligible for parole.

With respect to a sentence imposed pursuant to this subsection, the defendant shall not be entitled to a deduction of commutation and work credits from that sentence.

c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2) (a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of N.J.S.2C:29-9b.;

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 in furtherance of a conspiracy enumerated in N.J.S.2C:35-3;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

(k) The victim was less than 14 years old; or

(l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2).

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

(6) When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to subparagraph (h) of paragraph (5) of this subsection, the jury may consider the victim and survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence presented pursuant to subparagraph (h) of paragraph (5) of this subsection. As used in this paragraph "victim and survivor evidence" may include the display of a photograph of the victim taken before the homicide.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

h. In a sentencing proceeding conducted pursuant to this section, no evidence shall be admissible concerning the method or manner of execution which would be imposed on a defendant sentenced to death.

i. For purposes of this section the term "homicidal act" shall mean conduct that causes death or serious bodily injury resulting in death.

j. In a sentencing proceeding conducted pursuant to this section, the display of a photograph of the victim taken before the homicide shall be permitted.

L.1978, c.95; amended 1979, c.178, s.21; 1981, c.290, s.12; 1982, c.111, s.1; 1985, c.178, s.2; 1985, c.478; 1992, c.5; 1992, c.76; 1993, c.27; 1993, c.111; 1993, c.206; 1994, c.132; 1995, c.123; 1996, c.115, s.1; 1997, c.60, s.1; 1998, c.25; 1999, c.209; 1999, c.294, s.1; 2000, c.88; 2002, c.26, s.10.

COMMISSION WITNESSES

PUBLIC HEARING: JULY 19

Most Reverend John M. Smith: Bishop of the Roman Catholic Diocese of Trenton; page 4. **Sharon Hazard-Johnson:** Daughter of two murder victims; page 9. **Larry Peterson:** Former prisoner in New Jersey released on May 26, 2006, after Burlington County prosecutors dismissed the murder and sexual assault indictment against him; page 16. **Barry C. Scheck, Esq.:** Founder, Innocence Project in New York City; page 17. **Rabbi Gerald Zelizer:** Rabbi of Congregation Neve Shalom in Metuchen; Former President of the Rabbinical Assembly; page 24. **Lorry W. Post:** Father of a murder victim; Founder, New Jerseyans for Alternatives to the Death Penalty; page 27. **Kate Hill Germond:** Assistant Director, Centurion Ministries; page 30. **Reverend Jack Johnson:** Senior Pastor, First United Methodist Church of New Jersey; President, Coalition of Religious Leaders of New Jersey; Co-Chair, Board of Church and Society Greater New Jersey Conference United Methodist Church; page 35. **Richard C. Dieter:** Executive Director, Death Penalty Information Center in Washington, D.C.; page 35. **Dr. Matthew B. Johnson, Ph.D.:** Associate Professor, John Jay College of Criminal Justice in New York; page 40. **Sandra Manning, Esq.:** Chair, New Jerseyans for Alternatives to the Death Penalty; page 45. **Edith Frank:** Director, League of Women Voters of New Jersey; page 47. **Michael Murphy, Esq.:** Member, Advisory Committee New Jerseyans for Alternatives to the Death Penalty; page 50. **Marilyn Zdobinski, Esq.:** Former Assistant Prosecutor in Passaic County; page 50. **Dr. Robert Johnson, Ph.D.:** Professor; School of Public Affairs; Department of Justice, Law, and Society; American University; page 54. **Alisa Mariani:** Vice President, Somerset County American Civil Liberties Union (written testimony only).

WORKING SESSION: AUGUST 16

Hon. John J. Gibbons: Former Chief Judge of the United States Court of Appeals for the Third Circuit. **R. Erik Lillquist:** Professor of Law,

Seton Hall University Law School. **Joseph Krakora, Esq.:** Director of Capital Litigation for the New Jersey State Office of the Public Defender.

PUBLIC HEARING: SEPTEMBER 13

Hon. Raymond J. Lesniak: State Senator representing the 20th Legislative District; page 5. **Sandra Place:** Daughter of a murder victim; page 10. **Patricia Harrison:** Sister of a murder victim; page 17. **Jo Anne Barlieb:** Daughter of a murder victim; page 20. **Richard D. Pompelio, Esq.:** Father of a murder victim; Founder, New Jersey Crime Victims' Law Center; Former Chairman of the New Jersey Victims of Crime Compensation Board; page 27. **Hon. Robert J. Del Tufo, Esq.:** Former Attorney General of New Jersey; page 41. **Hon. Robert J. Martin:** State Senator representing the 26th Legislative District; page 51. **Patrick Murray, M.A.:** Founding Director, Monmouth University Polling Institute; page 67. **Vicki Schieber:** Mother of a murder victim; Member, Board of Directors, Murder Victims' Families for Human Rights; page 86. **Juan Roberto Melendez Colon:** Former prisoner on Florida's death row who was exonerated and released on January 3, 2002; page 103. **Daniel J. Carluccio, Esq.:** Former Ocean County Prosecutor; page 110. **Marilyn Flax:** Widow of a murder victim; page 134. **Marilyn Zdobinski, Esq.:** Former Assistant Prosecutor in Passaic County; page 136. **Jonathan E. Gradess:** Executive Director, New York State Defenders Association; page 151. **Sharon Hazard-Johnson:** Daughter of two murder victims; page 173. **Brian W. Kincaid, Esq.:** Attorney in private practice; page 185. **Anna "Cuqui" Rivera:** Delegate, Latino Leadership Alliance of New Jersey; page 203. **Mr. and Mrs. Gunnar Marsh:** Parents of a murder victim. (written testimony only)

PUBLIC HEARING: SEPTEMBER 27

James Wells: President, New Jersey Chapter of the National Association of Black Law Enforcement Officers, Inc; page 1. **Nate Walker:** Private citizen who was wrongfully

imprisoned in New Jersey for 10 years; page 5. **Jennifer Thompson:** Rape victim who wrongfully identified person as attacker leading to the person's wrongful imprisonment in North Carolina; page 8. **David Kascynski:** Executive Director, New Yorkers Against the Death Penalty; page 13. **Jack Callahan:** Private citizen; page 24. **Bill Babbitt:** Member, Board of Directors, Murder Victims' Families for Human Rights; page 31. **Kirk Bloodsworth:** First person exonerated from death row in the United States based on DNA evidence; page 44. **Wanda Foglia, Ph.D.:** Professor and Coordinator of the Master of Arts in Criminal Justice Program at Rowan University; page 44. **James E. Harris:** President, New Jersey State Conference of the National Association for the Advancement of Colored People; page 68. **Lawrence Hamm:** Chairman, People's Organization for Progress; page 73. **Ken Wolski:** Private citizen. (written testimony only) **Marilyn Zdobinski, Esq.:** Former Assistant Prosecutor in Passaic County. (written testimony only)

PUBLIC HEARING: OCTOBER 11

Hon. David Baime: Superior Court Judge (retired) and Special Master for Proportionality Review with regard to capital causes for the New Jersey Judiciary; page 3. **Robert Blecker:** Professor of Law at New York Law School; page 30. **Jeffrey Fagan:** Professor of Law & Public Health; Co-Director, Center for Crime, Community and Law at Columbia University; page 67. **Claudia Van Wyk, Esq.:** Attorney, Gibbons, Del Deo, Dolan, Griffinger & Vecchione; Formerly an attorney in the Office of the Public Defender, Appellate Section; page 89. **Robin Glenn, Esq.:** Legal Research Consultant; page 108.

PUBLIC HEARING: OCTOBER 25

Kent Scheidegger: Legal Director and General Counsel, Criminal Justice Legal Foundation (testified by videoconference); page 5. **Sam**

Millsap: Prosecutor on the case of Ruben Cantu, a Texan who may have been wrongfully executed; page 15. **Charles Ogletree, Jr.:** Jesse Climenko Professor of Law at Harvard Law School; Director, Charles Hamilton Houston Institute for Race and Justice (testified by videoconference); page 28. **Jim Barbo:** Director of Operations, New Jersey Department of Corrections; page 55. **Gary J. Hilton:** Former Superintendent of Trenton State Prison; Former Assistant Commissioner of the New Jersey Department of Corrections; page 63. **William Carl Piper, II:** Son of murder victim; page 78. **Molly Weigel:** Daughter-in-law of a murder victim; page 78. **Celeste Fitzgerald:** Director, New Jerseyans for Alternatives to the Death Penalty; page 84. **Kathleen M. Hiltner:** Executive Director, Center for Traumatic Grief & Victim Services; page 92. **Janet Poinsett, L.C.S.W.:** Member, clinical staff, Center for Traumatic Grief & Victim Services; page 96. **David Shepard:** Former prisoner who served 11 years before becoming the first person in New Jersey exonerated based on DNA evidence; page 103. **Bryan Miller:** Brother of a murder victim; Executive Director, Ceasefire New Jersey; page 108. **Kathryn Schwartz:** Chaplain, Morris County Correctional Facility; page 112. **Roy Riley:** Bishop, New Jersey Synod, Evangelical Lutheran Church in America. (testimony read by Ms. Schwartz) **David Ruhnke, Esq.:** Attorney, Runke & Barrett; page 115. **Clare Laura Hogenauer:** Private citizen; page 122. **John P. Nickas:** Representing Saint Peter Claver Church; page 125. **Thomas F. Langan, Jr.:** Representing New Jersey Pax Christi; page 127. **Hon. Joseph Azzolina:** Former State Senator and Assemblyman from the 13th Legislative District; page 128. (testimony read into record) **Marilyn Zdobinski, Esq.:** Former Assistant Prosecutor in Passaic County. (written testimony only) **Sharon Hazard-Johnson:** Daughter of two murder victims. (written testimony only)

EXHIBIT 6

LEGISLATIVE FISCAL ESTIMATE
SENATE COMMITTEE SUBSTITUTE FOR
SENATE, Nos. 171 and 2471
STATE OF NEW JERSEY
212th LEGISLATURE

DATED: NOVEMBER 21, 2007

SUMMARY

Synopsis: Eliminates the death penalty and replaces it with life imprisonment without eligibility for parole in certain circumstances.

Type of Impact: Indeterminate - See comments below.

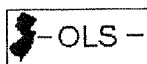
Agencies Affected: Judiciary, Office of the Public Defender, Department of Corrections, Department of Law and Public Safety, County Prosecutors, County Jails.

Office of Legislative Services Estimate

Fiscal Impact	<u>Short Term</u>	<u>Long Term</u>
Incarceration		
Costs	Savings of \$32,481 per inmate per year	Indeterminate-See comments below
Proportionality		
Review Costs	Savings of \$93,018 per review	Savings of \$93,018 per review
Trial Costs	Indeterminate - See comments below	
County Costs	Indeterminate - See comments below	

- The committee substitute eliminates the death penalty in New Jersey and replaces it with life imprisonment without eligibility for parole in certain circumstances.
- The Office of Legislative Services (OLS) concludes that due to the number of variables inherent in the consideration of this bill's impact it cannot quantify with accuracy the costs or savings to be generated by this bill. Variables include the number of death penalty eligible cases to be considered in the future; the respective strategies adopted by the prosecuting and defense attorneys should the death penalty be continued or eliminated; whether the State would resume carrying out death sentences or continue to house prisoners in the Capital Sentence Unit should the death penalty remain in effect; and how the courts will react to current law or the proposed bill.

*Office of Legislative Services
State House Annex
P.O. Box 068
Trenton, New Jersey 08625*



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- The cost of incarceration would be affected by the enactment of this bill. In the short run, savings would result from the ability to move inmates in the Capital Sentence Unit to the general population at an annual savings of \$32,481 per inmate. However, the bill's incarceration cost impact in the long term is uncertain. If the death penalty remains in effect and if the State were to begin to execute convicted offenders, the cost of housing an inmate in the Capital Sentence Unit for a limited time could ultimately be less than housing the inmate in the general population for the rest of his natural life. However, if the death penalty remains in effect and the State does not execute these offenders, the cost of housing them in the Capital Sentence Unit is substantially higher than the cost of housing them in the general population.
- The elimination of the death penalty would eliminate the necessity of conducting proportionality reviews, thus saving the State about \$93,018 per review.
- The OLS concludes that impact of this bill on trial costs cannot be accurately estimated because it is not clear whether the bill would prompt more plea bargains, thus eliminating the need for trial, or what strategies would be adopted by both the prosecuting and defense attorneys that would directly affect the cost of each trial.

BILL DESCRIPTION

Senate Committee Substitute for Senate Bill Nos. 171 and 2471 of 2007 eliminates the death penalty in New Jersey and replaces it with life imprisonment without eligibility for parole in certain circumstances.

Under the substitute, murder generally would continue to be punishable by a term of 30 years, during which the person shall not be eligible for parole, or a specific term of years between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole. This provision is unchanged from current law.

Current law also provides that the defendant must be sentenced to a term of life imprisonment without eligibility for parole if (1) the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, or (2) the victim was less than 14 years old and the murder was committed in the course of the commission of a violation of N.J.S.2C:14-2 (sexual assault) or N.J.S.2C:14-3 (criminal sexual contact). These provisions would also not be changed by the substitute.

The substitute amends paragraph (4) of subsection b. of N.J.S.A.2C:11-3 to provide that certain defendants convicted of murder would be sentenced to life imprisonment without eligibility for parole, to be served in a maximum security prison, if the jury finds beyond a reasonable doubt that any of the following aggravating factors exist:

- (a) The defendant has been convicted, at any time, of another murder;
- (b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;
- (c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;
- (d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;
- (e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of the Domestic Violence Act;

(h) The defendant murdered a public servant while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network and in furtherance of a conspiracy committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network in furtherance of a conspiracy;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2 (causing widespread injury or damage);

(k) The victim was less than 14 years old; or

(l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism.

These aggravating factors are identical to those set out in current law concerning the death penalty. Currently, if the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

The substitute provides that a juvenile who has been tried as an adult and convicted of murder would not be sentenced to life imprisonment without eligibility for parole under the provisions of the substitute concerning aggravating factors. Such a juvenile would remain subject to sentencing under the general sentencing provisions for murder (a term of 30 years to life with a term of parole ineligibility of 30 years). Current law provides that a juvenile tried as an adult and convicted of murder may not be sentenced to death.

Under the substitute, a juvenile tried as an adult and convicted of murder would remain subject to sentencing to life imprisonment without eligibility for parole if (1) the victim was a law enforcement officer and was murdered while performing official duties or murdered because of his status as a law enforcement officer, or (2) the victim was less than 14 years old and the murder was committed in the course of the commission of a sex crime. Both of these provisions are contained in current law.

An inmate sentenced to death prior to the date of enactment of this substitute, upon motion to the sentencing court and waiver of any further appeals related to sentencing, would be resentenced to a term of life imprisonment during which the defendant would not be eligible for parole. The sentence would be served in a maximum security prison. The substitute provides that any such motion to the sentencing court shall be made within 60 days of enactment of the act. If the motion is not made within 60 days the inmate would remain under the sentence of death previously imposed by the sentencing court.

The substitute provides that in addition to the provisions of any other law requiring restitution, a person convicted of murder would be required to pay restitution to the nearest surviving relative of the victim. The court would determine the amount and duration of the restitution.

FISCAL ANALYSIS**EXECUTIVE BRANCH****Office of the Attorney General**

No formal fiscal information has been received from the Office of the Attorney General concerning savings to be realized by the prosecution from the elimination of the death penalty. However, representatives from the office have noted that if the death penalty were abolished, these defendants would most likely be facing a very lengthy sentence, or life without parole. As a result, a trial to determine guilt or innocence would still be necessary, and both the prosecutor and public defender would be required to mount aggressive prosecution or defense efforts. Because of this, there would be little savings during the trial phase of prosecution.

Office of the Public Defender - Trial Costs

According to the Office of the Public Defender, as of August 2006 there was a caseload of 19 active death penalty cases being handled by this office. Of these cases, 4 had been added during the preceding 12 months. The Public Defender notes that the number of active death penalty cases is low because of the current environment against the death penalty. Prior to this decrease in death penalty prosecutions, the Public Defender's office had averaged between 40 and 50 cases per year.

In order to provide the best possible defense in capital cases, the Public Defender has traditionally assigned two attorneys to each death penalty case, one senior and one junior attorney. Elimination of the death penalty would allow the Public Defender to use one, rather than two attorneys in all criminal trials, generating savings.

All death penalty prosecutions consist of two phases, the actual trial to determine guilt or innocence and the sentencing phase to determine whether the death penalty or a term of imprisonment would be imposed. The abolition of the death penalty would generate savings through the elimination of the 2-week sentencing phase of a capital trial. This in turn would reduce the number of expert witnesses required and eliminate pool attorney costs for those cases in which a conflict among defendants exists.

The Office of the Public Defender states that based on an average number of 19 active death penalty cases per year, the abolition of the death penalty would save \$1,360,000 annually, consisting primarily of savings in the pool attorney and expert witnesses categories. An additional \$101,000 for appellate attorney salaries would also be saved for a total annual cost savings of \$1.46 million as follows:

PUBLIC DEFENDER COSTS			
Professional Services	Death Penalty	Non Death Penalty	Savings
Defense Attorney Costs	\$1,109,099	\$386,328	\$722,771
Expert witnesses	\$ 731,066	\$184,184	\$546,882
Court Reporters	\$ 41,902	\$ 0	\$ 41,902
Miscellaneous	\$ 49,030	\$ 0	\$ 49,030
Appellate Attorney Costs	\$ 101,000	\$ 0	\$101,000
TOTAL SAVINGS	\$2,032,097	\$ 570,512	\$1,461,585
Savings per trial based on 19 cases per year			\$76,926

Administrative Office of the Courts - Trial Costs, Proportionality Review Costs

The Administrative Office of the Courts (AOC) states that the elimination of the death penalty would generate savings for the Judiciary in two areas, trial court costs and the costs of conducting the proportionality review for each death penalty case.

Trial Costs

The following table provides the AOC's estimate of the cost of conducting a typical death penalty trial:

JUDICIARY TRIAL COSTS		
Salary Costs Position	Time Spent	Salary & Fringe Benefits
Superior Court Judge	48 days	\$39,440
Judge's Secretary	50.5 days	\$10,584
Court Clerk	45 days	\$ 8,660
Superior Court Law Clerk	50.5 days	\$ 9,431
Court Reporter	45 days	\$13,998
Criminal Division Manager	2 days	\$ 891
Probation Officer Report	2 days	\$ 605
Court Investigator	0.5 days	\$ 113
Total Salary Costs		\$83,722
Non-Salary Costs		
Overhead		\$48,240
Juror fees		\$16,223
Total Non-Salary Costs		\$64,463
TOTAL TRIAL COURT COSTS		\$148,185

According to the AOC, because of the different variables in non death penalty murder trials which range from the possibility of plea bargaining, negating the need for a trial altogether, to aggressive prosecution efforts and lengthy jury selection, information is not available concerning the cost of conducting a "typical" non-death penalty, life sentence without parole trial.

Proportionality Review Costs

Once an offender has been convicted in a death penalty trial, the State is required to conduct a proportionality review to determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Should the death penalty be abolished, proportionality review would cease. The following table illustrates the AOC's estimate of the time and associated costs devoted to proportionality review during death penalty cases.

JUDICIARY PROPORTIONALITY REVIEW COSTS		
Salary Costs Position	Time Spent	Salary & Fringe Benefits
Court-Appointed Special Master	16 days	\$ 4,900
Asst Director, Criminal Practice	5 days	\$ 2,285
Asst Chief Sentencing Unit	156 days	\$52,361
Legal Assistant	13 days	\$ 3,120
Statistical Consultant	14.5 days	\$14,527
Systems Coordinator	23 days	\$ 8,058
Head Data Entry Mach Operator	15 days	\$ 3,338
Sr. Data Entry Mach Operator	15 days	\$ 2,620
Secretarial Assistant	5 days	\$ 816
Judiciary Secretary	5 days	\$ 993
Total Salary Costs		\$93,018

Not included in this estimate is the cost of non salary items such as equipment, materials and supplies, fixed assets, maintenance, travel, training and capital improvements.

Department of Corrections - Incarceration Costs

According to the Department of Corrections, the cost of housing an inmate in the Capital Sentence Unit (death row) at the New Jersey State Prison totals about \$72,602 per year, \$32,481 more than the \$40,121 cost of housing an inmate within New Jersey State Prison's general population. Because New Jersey State Prison is a maximum security prison, requiring higher security levels, its average daily housing cost is higher than the department's average annual housing cost of \$32,000.

As of May, 2007, there were 9 inmates housed in the Capital Sentence Unit, for a total annual cost of \$653,418. It would cost the State \$361,089 to house these inmates in the general population of New Jersey State Prison, one of the State's two maximum security prisons, a savings of \$292,329 per year.

According to the department, the average age that an inmate enters the Capital Sentence Unit is 32. Elimination of the death penalty would result in a savings of \$32,481 for every year that each inmate is incarcerated. In light of the fact that no inmate has been put to death under the current death penalty statute, and assuming that upon conviction these inmates would serve 30 to 40 years within the Capital Sentence Unit, the elimination of the death penalty would save the State \$974,430 to \$1,299,240 per inmate over each inmate's lifetime.

However, elimination of the death penalty may increase the number individuals sentenced to life without parole.

County Jails - Incarceration Costs

Indicted offenders either receive bail and are allowed to go free until a trial or are incarcerated in a county jail facility until trial. Death penalty eligible offenders would most likely be denied bail and therefore would remain in the county jail until conviction or acquittal. Not included in the Department of Corrections housing cost is cost to the counties for housing these offenders until and during the trial. Often because of the time required for the defense and prosecuting attorneys to prepare for a death penalty trial, these offenders remain in the county jail facilities much longer than those tried in non-death penalty cases. Therefore, the elimination of the death penalty may reduce inmate housing costs at the county level.

SUMMARY

In sum, the potential and actual imposition of the death penalty affects many governmental agencies. While some of the costs can be identified, others such as the impact on the trial court schedule and backlog are not so easy to distinguish.

Some of the costs that have been identified by the various agencies involved with the prosecution, defense and housing of death penalty eligible offenders are summarized as follows:

SUMMARY GOVERNMENT AGENCY DEATH PENALTY COSTS	
AGENCY	COST
Attorney General's Office (Prosecutors)	Not available
Office of the Public Defender	\$ 76,926 per trial
Judiciary:	
Trial	\$ 148,185 per trial
Proportionality Review	\$ 93,018 per review
Department of Corrections	\$ 32,481 per inmate per year
County Jail Costs	Not available

OFFICE OF LEGISLATIVE SERVICES

The OLS concludes that due to the number of variables inherent in the consideration of this bill's impact, it cannot quantify with accuracy the exact cost or savings to be generated by this bill. Variables include the number of death penalty eligible cases to be considered in the future; the respective strategies adopted by the prosecuting and defense attorneys should the death penalty be continued or eliminated; whether the State would commence with putting inmates to death or continue to house them in the Capital Sentence Unit should the death penalty remain in effect; and how the court will react to current law or the proposed bill.

The OLS notes that while the cost of incarcerating an inmate in the Capital Sentence Unit is significantly higher than the cost of housing an inmate in a maximum security prison, the total cost of incarcerating an inmate in the Capital Sentence Unit would be reduced if the State were to begin executing those sentenced to death. Conversely, with the elimination of the death penalty, more inmates could be sentenced to life without parole, generating a cost to be borne for 30 years or more.

Trial costs vary greatly among criminal cases. Capital trial costs are traditionally higher than non-capital trial costs due to the extremely high stakes involved as well as the necessity to conduct the penalty phase to a capital trial. The OLS cannot estimate with any accuracy the potential short term or long term trial costs as a result of this bill's enactment.

Savings would also be generated from the elimination of the need to conduct proportionality reviews on all cases in which an offender is convicted and sentenced to capital punishment.

Section: Judiciary
Analyst: Anne Raughtley
Principal Fiscal Analyst
Approved: David J. Rosen
Legislative Budget and Finance Officer

This fiscal estimate has been prepared pursuant to P.L.1980, c.67 (C. 52:13B-1 et seq.).

§§2,3 -
C.2C:11-
3b &
2C:11-3c
§7 -
Repealer

P.L. 2007, CHAPTER 204, *approved December 17, 2007*
Senate Committee Substitute for
Senate, Nos. 171 and 2471

1 AN ACT to eliminate the death penalty and allow for life
2 imprisonment without eligibility for parole, revising various parts
3 of the statutory law, repealing P.L.1983, c.245, and supplementing
4 Title 2C of the New Jersey Statutes.

5
6 **BE IT ENACTED** by the Senate and General Assembly of the State
7 of New Jersey:

8
9 1. N.J.S.2C:11-3 is amended to read as follows:
10 2C:11-3 Murder.

11 a. Except as provided in N.J.S.2C:11-4, criminal homicide
12 constitutes murder when:

13 (1) The actor purposely causes death or serious bodily injury
14 resulting in death; or

15 (2) The actor knowingly causes death or serious bodily injury
16 resulting in death; or

17 (3) It is committed when the actor, acting either alone or with one
18 or more other persons, is engaged in the commission of, or an attempt
19 to commit, or flight after committing or attempting to commit
20 robbery, sexual assault, arson, burglary, kidnapping, carjacking,
21 criminal escape or terrorism pursuant to section 2 of P.L.2002, c.26
22 (C.2C:38-2), and in the course of such crime or of immediate flight
23 therefrom, any person causes the death of a person other than one of
24 the participants; except that in any prosecution under this subsection,
25 in which the defendant was not the only participant in the underlying
26 crime, it is an affirmative defense that the defendant:

27 (a) Did not commit the homicidal act or in any way solicit,
28 request, command, importune, cause or aid the commission thereof;
29 and

30 (b) Was not armed with a deadly weapon, or any instrument,
31 article or substance readily capable of causing death or serious
32 physical injury and of a sort not ordinarily carried in public places by
33 law-abiding persons; and

34 (c) Had no reasonable ground to believe that any other participant
35 was armed with such a weapon, instrument, article or substance; and

36 (d) Had no reasonable ground to believe that any other participant
37 intended to engage in conduct likely to result in death or serious
38 physical injury.

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

b. (1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in ~~subsection c.] paragraphs (2), (3) and (4) of this [section]~~ subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced~~], except as otherwise provided in subsection c. of this section,]~~ by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder ~~[and who is not sentenced to death under this section]~~ shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

(4) ~~[If the defendant was subject to sentencing pursuant to subsection c. and the jury or court found the existence of one or more aggravating factors, but that such factors did not outweigh the mitigating factors found to exist by the jury or court or the jury was unable to reach a unanimous verdict as to the weight of the factors, the defendant shall be sentenced by the court to a term of life imprisonment during which the defendant shall not be eligible for parole.]~~

With respect to a sentence imposed pursuant to this subsection, the defendant shall not be entitled to a deduction of commutation and work credits from that sentence. ~~]~~

Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced by the court to life imprisonment without eligibility for parole, which sentence shall be served in a maximum security prison, if a jury finds beyond a reasonable doubt that any of the following aggravating factors exist:

1 (a) The defendant has been convicted, at any time, of another
2 murder. For purposes of this section, a conviction shall be deemed
3 final when sentence is imposed and may be used as an aggravating
4 factor regardless of whether it is on appeal;

5 (b) In the commission of the murder, the defendant purposely or
6 knowingly created a grave risk of death to another person in addition
7 to the victim;

8 (c) The murder was outrageously or wantonly vile, horrible or
9 inhuman in that it involved torture, depravity of mind, or an
10 aggravated assault to the victim;

11 (d) The defendant committed the murder as consideration for the
12 receipt, or in expectation of the receipt of anything of pecuniary
13 value;

14 (e) The defendant procured the commission of the murder by
15 payment or promise of payment of anything of pecuniary value;

16 (f) The murder was committed for the purpose of escaping
17 detection, apprehension, trial, punishment or confinement for another
18 offense committed by the defendant or another;

19 (g) The murder was committed while the defendant was engaged
20 in the commission of, or an attempt to commit, or flight after
21 committing or attempting to commit murder, robbery, sexual assault,
22 arson, burglary, kidnapping, carjacking or the crime of contempt in
23 violation of N.J.S.2C:29-9b.;

24 (h) The defendant murdered a public servant, as defined in
25 N.J.S.2C:27-1, while the victim was engaged in the performance of
26 his official duties, or because of the victim's status as a public
27 servant;

28 (i) The defendant: (i) as a leader of a narcotics trafficking
29 network as defined in N.J.S.2C:35-3 and in furtherance of a
30 conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or
31 by threat or promise solicited the commission of the murder or (ii)
32 committed the murder at the direction of a leader of a narcotics
33 trafficking network as defined in N.J.S.2C:35-3 in furtherance of a
34 conspiracy enumerated in N.J.S.2C:35-3;

35 (j) The homicidal act that the defendant committed or procured
36 was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

37 (k) The victim was less than 14 years old; or

38 (l) The murder was committed during the commission of, or an
39 attempt to commit, or flight after committing or attempting to
40 commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-
41 2).

42 (5) A juvenile who has been tried as an adult and convicted of
43 murder shall be sentenced pursuant to paragraph (1), (2) or (3) of this
44 subsection.

45 c. **[Any person convicted under subsection a.(1) or (2) who**
46 **committed the homicidal act by his own conduct; or who as an**
47 **accomplice procured the commission of the offense by payment or**
48 **promise of payment of anything of pecuniary value; or who, as a**

1 leader of a narcotics trafficking network as defined in N.J.S.2C:35-3
2 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3,
3 commanded or by threat or promise solicited the commission of the
4 offense, or, if the murder occurred during the commission of the
5 crime of terrorism, any person who committed the crime of terrorism,
6 shall be sentenced as provided hereinafter:】

7 【(1) The court shall conduct a separate sentencing proceeding to
8 determine whether the defendant should be sentenced to death or
9 pursuant to the provisions of subsection b. of this section.

10 Where the defendant has been tried by a jury, the proceeding shall
11 be conducted by the judge who presided at the trial and before the
12 jury which determined the defendant's guilt, except that, for good
13 cause, the court may discharge that jury and conduct the proceeding
14 before a jury empaneled for the purpose of the proceeding. Where
15 the defendant has entered a plea of guilty or has been tried without a
16 jury, the proceeding shall be conducted by the judge who accepted
17 the defendant's plea or who determined the defendant's guilt and
18 before a jury empaneled for the purpose of the proceeding. On
19 motion of the defendant and with consent of the prosecuting attorney
20 the court may conduct a proceeding without a jury. Nothing in this
21 subsection shall be construed to prevent the participation of an
22 alternate juror in the sentencing proceeding if one of the jurors who
23 rendered the guilty verdict becomes ill or is otherwise unable to
24 proceed before or during the sentencing proceeding.】

25 【(2) (a) At the proceeding, the State shall have the burden of
26 establishing beyond a reasonable doubt the existence of any
27 aggravating factors set forth in paragraph (4) of this subsection. The
28 defendant shall have the burden of producing evidence of the
29 existence of any mitigating factors set forth in paragraph (5) of this
30 subsection but shall not have a burden with regard to the
31 establishment of a mitigating factor.

32 (b) The admissibility of evidence offered by the State to establish
33 any of the aggravating factors shall be governed by the rules
34 governing the admission of evidence at criminal trials. The
35 defendant may offer, without regard to the rules governing the
36 admission of evidence at criminal trials, reliable evidence relevant to
37 any of the mitigating factors. If the defendant produces evidence in
38 mitigation which would not be admissible under the rules governing
39 the admission of evidence at criminal trials, the State may rebut that
40 evidence without regard to the rules governing the admission of
41 evidence at criminal trials.

42 (c) Evidence admitted at the trial, which is relevant to the
43 aggravating and mitigating factors set forth in paragraphs (4) and (5)
44 of this subsection, shall be considered without the necessity of
45 reintroducing that evidence at the sentencing proceeding; provided
46 that the fact finder at the sentencing proceeding was present as either
47 the fact finder or the judge at the trial.

1 (d) The State and the defendant shall be permitted to rebut any
2 evidence presented by the other party at the sentencing proceeding
3 and to present argument as to the adequacy of the evidence to
4 establish the existence of any aggravating or mitigating factor.

5 (e) Prior to the commencement of the sentencing proceeding, or at
6 such time as he has knowledge of the existence of an aggravating
7 factor, the prosecuting attorney shall give notice to the defendant of
8 the aggravating factors which he intends to prove in the proceeding.

9 (f) Evidence offered by the State with regard to the establishment
10 of a prior homicide conviction pursuant to paragraph (4)(a) of this
11 subsection may include the identity and age of the victim, the manner
12 of death and the relationship, if any, of the victim to the defendant.】

13 【(3) The jury or, if there is no jury, the court shall return a special
14 verdict setting forth in writing the existence or nonexistence of each
15 of the aggravating and mitigating factors set forth in paragraphs (4)
16 and (5) of this subsection. If any aggravating factor is found to exist,
17 the verdict shall also state whether it outweighs beyond a reasonable
18 doubt any one or more mitigating factors.

19 (a) If the jury or the court finds that any aggravating factors exist
20 and that all of the aggravating factors outweigh beyond a reasonable
21 doubt all of the mitigating factors, the court shall sentence the
22 defendant to death.

23 (b) If the jury or the court finds that no aggravating factors exist,
24 or that all of the aggravating factors which exist do not outweigh all
25 of the mitigating factors, the court shall sentence the defendant
26 pursuant to subsection b.

27 (c) If the jury is unable to reach a unanimous verdict, the court
28 shall sentence the defendant pursuant to subsection b.】

29 【(4) The aggravating factors which may be found by the jury or
30 the court are:

31 (a) The defendant has been convicted, at any time, of another
32 murder. For purposes of this section, a conviction shall be deemed
33 final when sentence is imposed and may be used as an aggravating
34 factor regardless of whether it is on appeal;

35 (b) In the commission of the murder, the defendant purposely or
36 knowingly created a grave risk of death to another person in addition
37 to the victim;

38 (c) The murder was outrageously or wantonly vile, horrible or
39 inhuman in that it involved torture, depravity of mind, or an
40 aggravated assault to the victim;

41 (d) The defendant committed the murder as consideration for the
42 receipt, or in expectation of the receipt of anything of pecuniary
43 value;

44 (e) The defendant procured the commission of the murder by
45 payment or promise of payment of anything of pecuniary value;

46 (f) The murder was committed for the purpose of escaping
47 detection, apprehension, trial, punishment or confinement for another

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6

1 offense committed by the defendant or another;

2 (g) The murder was committed while the defendant was engaged
3 in the commission of, or an attempt to commit, or flight after
4 committing or attempting to commit murder, robbery, sexual assault,
5 arson, burglary, kidnapping, carjacking or the crime of contempt in
6 violation of N.J.S.2C:29-9b.;

7 (h) The defendant murdered a public servant, as defined in
8 N.J.S.2C:27-1, while the victim was engaged in the performance of
9 his official duties, or because of the victim's status as a public
10 servant;

11 (i) The defendant: (i) as a leader of a narcotics trafficking
12 network as defined in N.J.S.2C:35-3 and in furtherance of a
13 conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or
14 by threat or promise solicited the commission of the murder or (ii)
15 committed the murder at the direction of a leader of a narcotics
16 trafficking network as defined in N.J.S.2C:35-3 in furtherance of a
17 conspiracy enumerated in N.J.S.2C:35-3;

18 (j) The homicidal act that the defendant committed or procured
19 was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

20 (k) The victim was less than 14 years old; or

21 (l) The murder was committed during the commission of, or an
22 attempt to commit, or flight after committing or attempting to
23 commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-
24 2).】

25 【(5) The mitigating factors which may be found by the jury or the
26 court are:

27 (a) The defendant was under the influence of extreme mental or
28 emotional disturbance insufficient to constitute a defense to
29 prosecution;

30 (b) The victim solicited, participated in or consented to the
31 conduct which resulted in his death;

32 (c) The age of the defendant at the time of the murder;

33 (d) The defendant's capacity to appreciate the wrongfulness of his
34 conduct or to conform his conduct to the requirements of the law was
35 significantly impaired as the result of mental disease or defect or
36 intoxication, but not to a degree sufficient to constitute a defense to
37 prosecution;

38 (e) The defendant was under unusual and substantial duress
39 insufficient to constitute a defense to prosecution;

40 (f) The defendant has no significant history of prior criminal
41 activity;

42 (g) The defendant rendered substantial assistance to the State in
43 the prosecution of another person for the crime of murder; or

44 (h) Any other factor which is relevant to the defendant's character
45 or record or to the circumstances of the offense.】

46 【(6) When a defendant at a sentencing proceeding presents
47 evidence of the defendant's character or record pursuant to

1 subparagraph (h) of paragraph (5) of this subsection, the State may
2 present evidence of the murder victim's character and background and
3 of the impact of the murder on the victim's survivors. If the jury
4 finds that the State has proven at least one aggravating factor beyond
5 a reasonable doubt and the jury finds the existence of a mitigating
6 factor pursuant to subparagraph (h) of paragraph (5) of this
7 subsection, the jury may consider the victim and survivor evidence
8 presented by the State pursuant to this paragraph in determining the
9 appropriate weight to give mitigating evidence presented pursuant to
10 subparagraph (h) of paragraph (5) of this subsection. As used in this
11 paragraph "victim and survivor evidence" may include the display of
12 a photograph of the victim taken before the homicide. ~~](Deleted by~~
13 ~~amendment, P.L. , c.) (pending before the Legislature as this bill).~~

14 d. ~~](The sentencing proceeding set forth in subsection c. of this~~
15 ~~section shall not be waived by the prosecuting attorney.](Deleted by~~
16 ~~amendment, P.L. , c.) (pending before the Legislature as this bill).~~

17 e. ~~](Every judgment of conviction which results in a sentence of~~
18 ~~death under this section shall be appealed, pursuant to the Rules of~~
19 ~~Court, to the Supreme Court. Upon the request of the defendant, the~~
20 ~~Supreme Court shall also determine whether the sentence is~~
21 ~~disproportionate to the penalty imposed in similar cases, considering~~
22 ~~both the crime and the defendant. Proportionality review under this~~
23 ~~section shall be limited to a comparison of similar cases in which a~~
24 ~~sentence of death has been imposed under subsection c. of this~~
25 ~~section. In any instance in which the defendant fails, or refuses to~~
26 ~~appeal, the appeal shall be taken by the Office of the Public Defender~~
27 ~~or other counsel appointed by the Supreme Court for that purpose.](~~
28 ~~(Deleted by amendment, P.L. , c.) (pending before the Legislature~~
29 ~~as this bill).~~

30 f. ~~](Prior to the jury's sentencing deliberations, the trial court~~
31 ~~shall inform the jury of the sentences which may be imposed pursuant~~
32 ~~to subsection b. of this section on the defendant if the defendant is~~
33 ~~not sentenced to death. The jury shall also be informed that a failure~~
34 ~~to reach a unanimous verdict shall result in sentencing by the court~~
35 ~~pursuant to subsection b.](Deleted by amendment, P.L. , c.)~~
36 ~~(pending before the Legislature as this bill).~~

37 g. ~~](A juvenile who has been tried as an adult and convicted of~~
38 ~~murder shall not be sentenced pursuant to the provisions of~~
39 ~~subsection c. but shall be sentenced pursuant to the provisions of~~
40 ~~subsection b. of this section.](Deleted by amendment, P.L. , c.)~~
41 ~~(pending before the Legislature as this bill).~~

42 h. ~~](In a sentencing proceeding conducted pursuant to this~~
43 ~~section, no evidence shall be admissible concerning the method or~~
44 ~~manner of execution which would be imposed on a defendant~~
45 ~~sentenced to death.](Deleted by amendment, P.L. , c.) (pending~~
46 ~~before the Legislature as this bill).~~

47 i. For purposes of this section the term "homicidal act" shall

1 mean conduct that causes death or serious bodily injury resulting in
2 death.

3 j. In a sentencing proceeding conducted pursuant to this section,
4 the display of a photograph of the victim taken before the homicide
5 shall be permitted.

6 (cf: P.L.2002, c.26, s.10)

7
8 2. (New section) An inmate sentenced to death prior to the date
9 of the enactment of this act, upon motion to the sentencing court and
10 waiver of any further appeals related to sentencing, shall be
11 resented to a term of life imprisonment during which the
12 defendant shall not be eligible for parole. Such sentence shall be
13 served in a maximum security prison.

14 Any such motion to the sentencing court shall be made within 60
15 days of the enactment of this act. If the motion is not made within 60
16 days the inmate shall remain under the sentence of death previously
17 imposed by the sentencing court.

18
19 3. (New section) In addition to the provisions of any other law
20 requiring restitution, a person convicted of murder pursuant to
21 N.J.S.2C:11-3 shall be required to pay restitution to the nearest
22 surviving relative of the victim. The court shall determine the amount
23 and duration of the restitution pursuant to N.J.S.2C:43-3 and the
24 provisions of chapter 46 of Title 2C of the New Jersey Statutes.

25
26 4. N.J.S.2B:23-10 is amended to read as follows:

27 2B:23-10. Examination of jurors. [a.] In the discretion of the
28 court, parties to any trial may question any person summoned as a
29 juror after the name is drawn and before the swearing, and without
30 the interposition of any challenge, to determine whether or not to
31 interpose a peremptory challenge or a challenge for cause. Such
32 examination shall be permitted in order to disclose whether or not the
33 juror is qualified, impartial and without interest in the result of the
34 action. The questioning shall be conducted in open court under the
35 trial judge's supervision.

36 b. [The examination of jurors shall be under oath only in cases
37 in which a death penalty may be imposed.] (Deleted by amendment,
38 P.L. , c.) (pending before the Legislature as this bill).

39 (cf: N.J.S.2B:23-10)

40
41 5. N.J.S.2B:23-13 is amended to read as follows:

42 2B:23-13. Peremptory challenges.

43 Upon the trial of any action in any court of this State, the parties
44 shall be entitled to peremptory challenges as follows:

45 a. In any civil action, each party, 6.

46 b. Upon an indictment for kidnapping, murder, aggravated
47 manslaughter, manslaughter, aggravated assault, aggravated sexual

1 assault, sexual assault, aggravated criminal sexual contact,
2 aggravated arson, arson, burglary, robbery, forgery if it constitutes a
3 crime of the third degree as defined by subsection b. of N.J.S.2C:21-
4 1, or perjury, the defendant, 20 peremptory challenges if tried alone
5 and 10 challenges if tried jointly and the State, 12 peremptory
6 challenges if the defendant is tried alone and 6 peremptory challenges
7 for each 10 afforded the defendants if tried jointly. [The trial court,
8 in its discretion, may, however, increase proportionally the number of
9 peremptory challenges available to the defendant and the State in any
10 case in which the sentencing procedure set forth in subsection c. of
11 N.J.S.2C:11-3 might be utilized.]

12 c. Upon any other indictment, defendants, 10 each; the State, 10
13 peremptory challenges for each 10 challenges allowed to the
14 defendants. When the case is to be tried by a jury from another
15 county, each defendant, 5 peremptory challenges, and the State, 5
16 peremptory challenges for each 5 peremptory challenges afforded the
17 defendants.

18 (cf: N.J.S.2B:23-13)

19

20 6. Section 7 of P.L.1979, c.441 (C.30:4-123.51) is amended to
21 read as follows:

22 7. a. Each adult inmate sentenced to a term of incarceration in a
23 county penal institution, or to a specific term of years at the State
24 Prison or the correctional institution for women shall become
25 primarily eligible for parole after having served any judicial or
26 statutory mandatory minimum term, or one-third of the sentence
27 imposed where no mandatory minimum term has been imposed less
28 commutation time for good behavior pursuant to N.J.S.2A:164-24 or
29 R.S.30:4-140 and credits for diligent application to work and other
30 institutional assignments pursuant to P.L.1972, c.115 (C.30:8-28.1 et
31 seq.) or R.S.30:4-92. Consistent with the provisions of the New
32 Jersey Code of Criminal Justice (N.J.S.2C:11-3, 2C:14-6, 2C:43-6,
33 2C:43-7), commutation and work credits shall not in any way reduce
34 any judicial or statutory mandatory minimum term and such credits
35 accrued shall only be awarded subsequent to the expiration of the
36 term.

37 b. Each adult inmate sentenced to a term of life imprisonment
38 shall become primarily eligible for parole after having served any
39 judicial or statutory mandatory minimum term, or 25 years where no
40 mandatory minimum term has been imposed less commutation time
41 for good behavior and credits for diligent application to work and
42 other institutional assignments. If an inmate sentenced to a specific
43 term or terms of years is eligible for parole on a date later than the
44 date upon which he would be eligible if a life sentence had been
45 imposed, then in such case the inmate shall be eligible for parole after
46 having served 25 years, less commutation time for good behavior and
47 credits for diligent application to work and other institutional

1 assignments. Consistent with the provisions of the New Jersey Code
2 of Criminal Justice (N.J.S.2C:11-3, 2C:14-6, 2C:43-6, 2C:43-7),
3 commutation and work credits shall not in any way reduce any
4 judicial or statutory mandatory minimum term and such credits
5 accrued shall only be awarded subsequent to the expiration of the
6 term.

7 c. Each inmate sentenced to a specific term of years pursuant to
8 the "Controlled Dangerous Substances Act," P.L.1970, c.226
9 (C.24:21-1 through 45) shall become primarily eligible for parole
10 after having served one-third of the sentence imposed less
11 commutation time for good behavior and credits for diligent
12 application to work and other institutional assignments.

13 d. Each adult inmate sentenced to an indeterminate term of years
14 as a young adult offender pursuant to N.J.S.2C:43-5 shall become
15 primarily eligible for parole consideration pursuant to a schedule of
16 primary eligibility dates developed by the board, less adjustment for
17 program participation. In no case shall the board schedule require
18 that the primary parole eligibility date for a young adult offender be
19 greater than the primary parole eligibility date required pursuant to
20 this section for the presumptive term for the crime authorized
21 pursuant to N.J.S.2C:44-1(f).

22 e. Each adult inmate sentenced for an offense specified in
23 N.J.S.2C:47-1 shall become primarily eligible for parole as follows:

24 (1) If the court finds that the offender's conduct was not
25 characterized by a pattern of repetitive, compulsive behavior or finds
26 that the offender is not amenable to sex offender treatment, or if after
27 sentencing the Department of Corrections in its most recent
28 examination determines that the offender is not amenable to sex
29 offender treatment, the offender shall become primarily eligible for
30 parole after having served any judicial or statutory mandatory
31 minimum term or one-third of the sentence imposed where no
32 mandatory minimum term has been imposed. Neither such term shall
33 be reduced by commutation time for good behavior pursuant to
34 R.S.30:4-140 or credits for diligent application to work and other
35 institutional assignments pursuant to R.S.30:4-92.

36 (2) All other offenders shall be eligible for parole pursuant to the
37 provisions of N.J.S.2C:47-5, except no offender shall become
38 primarily eligible for parole prior to the expiration of any judicial or
39 statutory mandatory minimum term.

40 f. Each juvenile inmate committed to an indeterminate term shall
41 be immediately eligible for parole.

42 g. Each adult inmate of a county jail, workhouse or penitentiary
43 shall become primarily eligible for parole upon service of 60 days of
44 his aggregate sentence or as provided for in subsection a. of this
45 section, whichever is greater. Whenever any such inmate's parole
46 eligibility is within six months of the date of such sentence, the judge
47 shall state such eligibility on the record which shall satisfy all public

1 and inmate notice requirements. The chief executive officer of the
2 institution in which county inmates are held shall generate all reports
3 pursuant to subsection d. of section 10 of P.L.1979, c.441 (C.30:4-
4 123.54). The parole board shall have the authority to promulgate
5 time periods applicable to the parole processing of inmates of county
6 penal institutions, except that no inmate may be released prior to the
7 primary eligibility date established by this subsection, unless
8 consented to by the sentencing judge. No inmate sentenced to a
9 specific term of years at the State Prison or the correctional
10 institution for women shall become primarily eligible for parole until
11 service of a full nine months of his aggregate sentence.

12 h. When an inmate is sentenced to more than one term of
13 imprisonment, the primary parole eligibility terms calculated
14 pursuant to this section shall be aggregated by the board for the
15 purpose of determining the primary parole eligibility date, except that
16 no juvenile commitment shall be aggregated with any adult sentence.
17 The board shall promulgate rules and regulations to govern
18 aggregation under this subsection.

19 i. The primary eligibility date shall be computed by a designated
20 representative of the board and made known to the inmate in writing
21 not later than 90 days following the commencement of the sentence.
22 In the case of an inmate sentenced to a county penal institution such
23 notice shall be made pursuant to subsection g. of this section. Each
24 inmate shall be given the opportunity to acknowledge in writing the
25 receipt of such computation. Failure or refusal by the inmate to
26 acknowledge the receipt of such computation shall be recorded by the
27 board but shall not constitute a violation of this subsection.

28 j. Except as provided in this subsection, each inmate sentenced
29 pursuant to N.J.S.2A:113-4 for a term of life imprisonment,
30 N.J.S.2A:164-17 for a fixed minimum and maximum term or
31 N.J.S.2C:1-1(b) shall not be primarily eligible for parole on a date
32 computed pursuant to this section, but shall be primarily eligible on a
33 date computed pursuant to P.L.1948, c.84 (C.30:4-123.1 et seq.),
34 which is continued in effect for this purpose. Inmates classified as
35 second, third or fourth offenders pursuant to section 12 of P.L.1948,
36 c.84 (C.30:4-123.12) shall become primarily eligible for parole after
37 serving one-third, one-half or two-thirds of the maximum sentence
38 imposed, respectively, less in each instance commutation time for
39 good behavior and credits for diligent application to work and other
40 institutional assignments; provided, however, that if the prosecuting
41 attorney or the sentencing court advises the board that the punitive
42 aspects of the sentence imposed on such inmates will not have been
43 fulfilled by the time of parole eligibility calculated pursuant to this
44 subsection, then the inmate shall not become primarily eligible for
45 parole until serving an additional period which shall be one-half of
46 the difference between the primary parole eligibility date calculated
47 pursuant to this subsection and the parole eligibility date calculated

SCS for S171

12

1 pursuant to section 12 of P.L.1948, c.84 (C.30:4-123.12). If the
2 prosecuting attorney or the sentencing court advises the board that the
3 punitive aspects of the sentence have not been fulfilled, such advice
4 need not be supported by reasons and will be deemed conclusive and
5 final. Any such decision shall not be subject to judicial review
6 except to the extent mandated by the New Jersey and United States
7 Constitutions. The board shall, reasonably prior to considering any
8 such case, advise the prosecuting attorney and the sentencing court of
9 all information relevant to such inmate's parole eligibility.

10 k. Notwithstanding any provisions of this section to the contrary,
11 a person sentenced to imprisonment pursuant to paragraph (2) ~~or~~
12 (3) or (4) of subsection b. of N.J.S.2C:11-3 shall not be eligible for
13 parole.

14 l. Notwithstanding the provisions of subsections a. through j. of
15 this section, the appropriate board panel, as provided in section 1 of
16 P.L.1997, c.214 (C.30:4-123.51c), may release an inmate serving a
17 sentence of imprisonment on medical parole at any time.
18 (cf: P.L.1998, c.73, s.2)

19
20 7. P.L.1983, c.245 (C.2C:49-1 through 2C:49-12, inclusive) is
21 repealed.

22
23 8. This act shall take effect immediately.

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27
28 Eliminates the death penalty and replaces it with life imprisonment
29 without eligibility for parole in certain circumstances.

EXHIBIT 7

CHAPTER 204

AN ACT to eliminate the death penalty and allow for life imprisonment without eligibility for parole, revising various parts of the statutory law, repealing P.L.1983, c.245, and supplementing Title 2C of the New Jersey Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. N.J.S.2C:11-3 is amended to read as follows:

Murder.

2C:11-3. Murder.

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when:

- (1) The actor purposely causes death or serious bodily injury resulting in death; or
- (2) The actor knowingly causes death or serious bodily injury resulting in death; or
- (3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. (1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

(4) Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a

narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced by the court to life imprisonment without eligibility for parole, which sentence shall be served in a maximum security prison, if a jury finds beyond a reasonable doubt that any of the following aggravating factors exist:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of subsection b. of N.J.S.2C:29-9;

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 in furtherance of a conspiracy enumerated in N.J.S.2C:35-3;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

(k) The victim was less than 14 years old; or

(l) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2).

(5) A juvenile who has been tried as an adult and convicted of murder shall be sentenced pursuant to paragraph (1), (2) or (3) of this subsection.

c. (Deleted by amendment, P.L.2007, c.204).

d. (Deleted by amendment, P.L.2007, c.204).

e. (Deleted by amendment, P.L.2007, c.204).

f. (Deleted by amendment, P.L.2007, c.204).

g. (Deleted by amendment, P.L.2007, c.204).

h. (Deleted by amendment, P.L.2007, c.204).

i. For purposes of this section the term "homicidal act" shall mean conduct that causes

death or serious bodily injury resulting in death.

j. In a sentencing proceeding conducted pursuant to this section, the display of a photograph of the victim taken before the homicide shall be permitted.

C.2C:11-3b Resentencing to term of life imprisonment.

2. An inmate sentenced to death prior to the date of the enactment of this act, upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole. Such sentence shall be served in a maximum security prison.

Any such motion to the sentencing court shall be made within 60 days of the enactment of this act. If the motion is not made within 60 days the inmate shall remain under the sentence of death previously imposed by the sentencing court.

C.2C:11-3c Restitution.

3. In addition to the provisions of any other law requiring restitution, a person convicted of murder pursuant to N.J.S.2C:11-3 shall be required to pay restitution to the nearest surviving relative of the victim. The court shall determine the amount and duration of the restitution pursuant to N.J.S.2C:43-3 and the provisions of chapter 46 of Title 2C of the New Jersey Statutes.

4. N.J.S.2B:23-10 is amended to read as follows:

Examination of jurors.

2B:23-10. Examination of jurors. a. In the discretion of the court, parties to any trial may question any person summoned as a juror after the name is drawn and before the swearing, and without the interposition of any challenge, to determine whether or not to interpose a peremptory challenge or a challenge for cause. Such examination shall be permitted in order to disclose whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted in open court under the trial judge's supervision.

b. (Deleted by amendment, P.L.2007, c.204).

5. N.J.S.2B:23-13 is amended to read as follows:

Peremptory challenges.

2B:23-13. Peremptory challenges.

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. In any civil action, each party, 6.

b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S.2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded the defendants if tried jointly.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

6. Section 7 of P.L.1979, c.441 (C.30:4-123.51) is amended to read as follows:

C.30:4-123.51 Eligibility for parole.

7. a. Each adult inmate sentenced to a term of incarceration in a county penal institution, or to a specific term of years at the State Prison or the correctional institution for women shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or one-third of the sentence imposed where no mandatory minimum term has been imposed less commutation time for good behavior pursuant to N.J.S.2A:164-24 or R.S.30:4-140 and credits for diligent application to work and other institutional assignments pursuant to P.L.1972, c.115 (C.30:8-28.1 et seq.) or R.S.30:4-92. Consistent with the provisions of the New Jersey Code of Criminal Justice (N.J.S.2C:11-3, 2C:14-6, 2C:43-6, 2C:43-7), commutation and work credits shall not in any way reduce any judicial or statutory mandatory minimum term and such credits accrued shall only be awarded subsequent to the expiration of the term.

b. Each adult inmate sentenced to a term of life imprisonment shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term, or 25 years where no mandatory minimum term has been imposed less commutation time for good behavior and credits for diligent application to work and other institutional assignments. If an inmate sentenced to a specific term or terms of years is eligible for parole on a date later than the date upon which he would be eligible if a life sentence had been imposed, then in such case the inmate shall be eligible for parole after having served 25 years, less commutation time for good behavior and credits for diligent application to work and other institutional assignments. Consistent with the provisions of the New Jersey Code of Criminal Justice (N.J.S.2C:11-3, 2C:14-6, 2C:43-6, 2C:43-7), commutation and work credits shall not in any way reduce any judicial or statutory mandatory minimum term and such credits accrued shall only be awarded subsequent to the expiration of the term.

c. Each inmate sentenced to a specific term of years pursuant to the "Controlled Dangerous Substances Act," P.L.1970, c.226 (C.24:21-1 et al.) shall become primarily eligible for parole after having served one-third of the sentence imposed less commutation time for good behavior and credits for diligent application to work and other institutional assignments.

d. Each adult inmate sentenced to an indeterminate term of years as a young adult offender pursuant to N.J.S.2C:43-5 shall become primarily eligible for parole consideration pursuant to a schedule of primary eligibility dates developed by the board, less adjustment for program participation. In no case shall the board schedule require that the primary parole eligibility date for a young adult offender be greater than the primary parole eligibility date required pursuant to this section for the presumptive term for the crime authorized pursuant to subsection f. of N.J.S.2C:44-1.

e. Each adult inmate sentenced for an offense specified in N.J.S.2C:47-1 shall become primarily eligible for parole as follows:

(1) If the court finds that the offender's conduct was not characterized by a pattern of repetitive, compulsive behavior or finds that the offender is not amenable to sex offender

treatment, or if after sentencing the Department of Corrections in its most recent examination determines that the offender is not amenable to sex offender treatment, the offender shall become primarily eligible for parole after having served any judicial or statutory mandatory minimum term or one-third of the sentence imposed where no mandatory minimum term has been imposed. Neither such term shall be reduced by commutation time for good behavior pursuant to R.S.30:4-140 or credits for diligent application to work and other institutional assignments pursuant to R.S.30:4-92.

(2) All other offenders shall be eligible for parole pursuant to the provisions of N.J.S.2C:47-5, except no offender shall become primarily eligible for parole prior to the expiration of any judicial or statutory mandatory minimum term.

f. Each juvenile inmate committed to an indeterminate term shall be immediately eligible for parole.

g. Each adult inmate of a county jail, workhouse or penitentiary shall become primarily eligible for parole upon service of 60 days of his aggregate sentence or as provided for in subsection a. of this section, whichever is greater. Whenever any such inmate's parole eligibility is within six months of the date of such sentence, the judge shall state such eligibility on the record which shall satisfy all public and inmate notice requirements. The chief executive officer of the institution in which county inmates are held shall generate all reports pursuant to subsection d. of section 10 of P.L.1979, c.441 (C.30:4-123.54). The parole board shall have the authority to promulgate time periods applicable to the parole processing of inmates of county penal institutions, except that no inmate may be released prior to the primary eligibility date established by this subsection, unless consented to by the sentencing judge. No inmate sentenced to a specific term of years at the State Prison or the correctional institution for women shall become primarily eligible for parole until service of a full nine months of his aggregate sentence.

h. When an inmate is sentenced to more than one term of imprisonment, the primary parole eligibility terms calculated pursuant to this section shall be aggregated by the board for the purpose of determining the primary parole eligibility date, except that no juvenile commitment shall be aggregated with any adult sentence. The board shall promulgate rules and regulations to govern aggregation under this subsection.

i. The primary eligibility date shall be computed by a designated representative of the board and made known to the inmate in writing not later than 90 days following the commencement of the sentence. In the case of an inmate sentenced to a county penal institution such notice shall be made pursuant to subsection g. of this section. Each inmate shall be given the opportunity to acknowledge in writing the receipt of such computation. Failure or refusal by the inmate to acknowledge the receipt of such computation shall be recorded by the board but shall not constitute a violation of this subsection.

j. Except as provided in this subsection, each inmate sentenced pursuant to N.J.S.2A:113-4 for a term of life imprisonment, N.J.S.2A:164-17 for a fixed minimum and maximum term or subsection b. of N.J.S.2C:1-1 shall not be primarily eligible for parole on a date computed pursuant to this section, but shall be primarily eligible on a date computed pursuant to P.L.1948, c.84 (C.30:4-123.1 et seq.), which is continued in effect for this purpose. Inmates classified as second, third or fourth offenders pursuant to section 12 of P.L.1948, c.84 (C.30:4-123.12) shall become primarily eligible for parole after serving one-third, one-half or two-thirds of the maximum sentence imposed, respectively, less in each instance commutation time for good behavior and credits for diligent application to work and other institutional assignments; provided, however, that if the prosecuting attorney or the

sentencing court advises the board that the punitive aspects of the sentence imposed on such inmates will not have been fulfilled by the time of parole eligibility calculated pursuant to this subsection, then the inmate shall not become primarily eligible for parole until serving an additional period which shall be one-half of the difference between the primary parole eligibility date calculated pursuant to this subsection and the parole eligibility date calculated pursuant to section 12 of P.L.1948, c.84 (C.30:4-123.12). If the prosecuting attorney or the sentencing court advises the board that the punitive aspects of the sentence have not been fulfilled, such advice need not be supported by reasons and will be deemed conclusive and final. Any such decision shall not be subject to judicial review except to the extent mandated by the New Jersey and United States Constitutions. The board shall, reasonably prior to considering any such case, advise the prosecuting attorney and the sentencing court of all information relevant to such inmate's parole eligibility.

k. Notwithstanding any provisions of this section to the contrary, a person sentenced to imprisonment pursuant to paragraph (2), (3) or (4) of subsection b. of N.J.S.2C:11-3 shall not be eligible for parole.

l. Notwithstanding the provisions of subsections a. through j. of this section, the appropriate board panel, as provided in section 1 of P.L.1997, c.214 (C.30:4-123.51c), may release an inmate serving a sentence of imprisonment on medical parole at any time.

Repealer.

7. P.L.1983, c.245 (C.2C:49-1 through 2C:49-12, inclusive) is repealed.

8. This act shall take effect immediately.

Approved December 17, 2007.

EXHIBIT 8

**Dec-17-07 Governor Corzine Signs Legislation
Eliminating Death Penalty in New Jersey**

[Español](#)

NEWS RELEASE

Governor Jon S. Corzine
December 17, 2007

FOR MORE INFORMATION:

Press Office
609-777-2600

**GOVERNOR CORZINE SIGNS LEGISLATION
ELIMINATING DEATH PENALTY IN NEW JERSEY**

TRENTON - Governor Jon S. Corzine today signed legislation abolishing the death penalty in New Jersey and replacing it with life imprisonment without parole. New Jersey is the first state in the nation to enact a law to end use of the death penalty since it was reinstated by the United States Supreme Court in 1976. To ensure that the intent of the legislation was fully carried out as to the eight remaining inmates on death row, on Sunday evening Governor Corzine commuted the sentences of those inmates to life in prison without parole.

"Today New Jersey evolves. This is a day of progress for us and for the millions of people across our nation and around the globe who reject the death penalty as a moral or practical response to the grievous, even heinous, crime of murder," Corzine said. "I have been moved by the passionate views on both sides of this issue, and I firmly believe that replacing the death penalty with life in prison without parole best captures our State's highest values and reflects our best efforts to search for true justice."

"We can't logically argue the deterrent factor of the death penalty when, in fact, we never use it," said Senate President Richard J. Codey (D-Essex). "The best thing we can do for the residents of New Jersey is to enact a measure that will speak to the truth of what the real sentence is and help victim's families put this painful chapter in their life behind them more quickly,"

"New Jersey's death penalty has been nothing more than a paper deterrent, the epitome of false security," said Speaker Joe Roberts (D-Camden). "When Sister Helen Prejean visited the State House last month, she said that by abolishing the death penalty New Jersey would become 'a beacon on a hill.' At the least, we have set an example for other states to follow."

"I can't imagine how I would react if I had a loved one murdered. Hopefully, my faith would guide me as it has guided the families of murder victims who have supported repeal of the death penalty," said Senator Raymond J. Lesniak (D-Union). "It's not often we vote our conscience in the legislature. We should do it more often."

"Our death penalty has been cruel and unusual punishment both for the criminals on death row and the families of the victims," said Assemblyman Wilfredo Caraballo (D-Essex/Union). "We have seized the moment and now join the ranks of other states and countries that view the death penalty as discriminatory, immoral, and barbaric. We're a better state than one that puts people to death."

The legislation (S171/A3716) was sponsored in the Senate by Senator Raymond J. Lesniak (D-Union), Senator Robert J. Martin (R-Morris/Passaic), Senator Shirley K. Turner (D-Mercer) and Senator Nia H. Gill (D-Essex/Passaic). It was sponsored in the Assembly by Assemblyman Wilfredo Caraballo (D-Essex/Union), Assemblyman Christopher Bateman (R-Morris/Somerset), Assemblyman Gordon M. Johnson (D-Bergen), Assemblywoman Valerie Vainieri Huttie (D-Bergen) and Assemblywoman Nilsa Cruz-Perez (D-Camden/Gloucester).

EXHIBIT 9

AN ACT

RELATING TO CAPITAL FELONY SENTENCING; ABOLISHING THE DEATH
PENALTY; PROVIDING FOR LIFE IMPRISONMENT WITHOUT POSSIBILITY
OF RELEASE OR PAROLE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 31-18-14 NMSA 1978 (being Laws 1979,
Chapter 150, Section 1, as amended) is amended to read:

"31-18-14. SENTENCING AUTHORITY--CAPITAL FELONIES.--

When a defendant has been convicted of a capital felony, the
defendant shall be sentenced to life imprisonment or life
imprisonment without possibility of release or parole."

Section 2. Section 31-18-23 NMSA 1978 (being Laws 1994,
Chapter 24, Section 2, as amended) is amended to read:

"31-18-23. THREE VIOLENT FELONY CONVICTIONS--MANDATORY
LIFE IMPRISONMENT--EXCEPTION.--

A. When a defendant is convicted of a third
violent felony, and each violent felony conviction is part of
a separate transaction or occurrence, and at least the third
violent felony conviction is in New Mexico, the defendant
shall, in addition to the sentence imposed for the third
violent conviction, be punished by a sentence of life
imprisonment. The life imprisonment sentence shall be subject
to parole pursuant to the provisions of Section 31-21-10 NMSA
1978.

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B. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violent felony conviction, pursuant to the provisions of Section 31-18-24 NMSA 1978.

C. For the purpose of this section, a violent felony conviction incurred by a defendant before the defendant reaches the age of eighteen shall not count as a violent felony conviction.

D. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent felony for the purposes of the Criminal Sentencing Act if that crime would be considered a violent felony in New Mexico.

E. As used in the Criminal Sentencing Act:

(1) "great bodily harm" means an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body; and

(2) "violent felony" means:

(a) murder in the first or second degree, as provided in Section 30-2-1 NMSA 1978;

(b) shooting at or from a motor vehicle resulting in great bodily harm, as provided in Subsection B of HB 285
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Section 30-3-8 NMSA 1978;

(c) kidnapping resulting in great bodily harm inflicted upon the victim by the victim's captor, as provided in Subsection B of Section 30-4-1 NMSA 1978;

(d) criminal sexual penetration, as provided in Subsection C or D or Paragraph (5) or (6) of Subsection E of Section 30-9-11 NMSA 1978; and

(e) robbery while armed with a deadly weapon resulting in great bodily harm as provided in Section 30-16-2 NMSA 1978 and Subsection A of Section 30-1-12 NMSA 1978."

Section 3. Section 31-20A-2 NMSA 1978 (being Laws 1979, Chapter 150, Section 3) is amended to read:

"31-20A-2. CAPITAL FELONY--DETERMINATION OF SENTENCE.--

If a jury finds, beyond a reasonable doubt, that one or more aggravating circumstances exist, as enumerated in Section 31-20A-5 NMSA 1978, the defendant shall be sentenced to life imprisonment without possibility of release or parole. If the jury does not make the finding that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment."

Section 4. Section 31-21-10 NMSA 1978 (being Laws 1980, Chapter 28, Section 1, as amended) is amended to read:

"31-21-10. PAROLE AUTHORITY AND PROCEDURE.--

A. An inmate of an institution who was sentenced

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to life imprisonment becomes eligible for a parole hearing after the inmate has served thirty years of the sentence. Before ordering the parole of an inmate sentenced to life imprisonment, the board shall:

(1) interview the inmate at the institution where the inmate is committed;

(2) consider all pertinent information concerning the inmate, including:

(a) the circumstances of the offense;

(b) mitigating and aggravating circumstances;

(c) whether a deadly weapon was used in the commission of the offense;

(d) whether the inmate is a habitual offender;

(e) the reports filed under Section 31-21-9 NMSA 1978; and

(f) the reports of such physical and mental examinations as have been made while in an institution;

(3) make a finding that a parole is in the best interest of society and the inmate; and

(4) make a finding that the inmate is able and willing to fulfill the obligations of a law-abiding citizen.

If parole is denied, the inmate sentenced to life

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imprisonment shall again become entitled to a parole hearing at two-year intervals. The board may, on its own motion, reopen any case in which a hearing has already been granted and parole denied.

B. Unless the board finds that it is in the best interest of society and the parolee to reduce the period of parole, a person who was sentenced to life imprisonment shall be required to undergo a minimum period of parole of five years. During the period of parole, the person shall be under the guidance and supervision of the board.

C. An inmate of an institution who was sentenced to life imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for the entirety of the inmate's natural life.

D. Except for certain sex offenders as provided in Section 31-21-10.1 NMSA 1978, an inmate who was convicted of a first, second or third degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a two-year period of parole. An inmate who was convicted of a fourth degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a one-year period of parole. During the period of parole, the person shall be under the guidance and

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supervision of the board.

E. Every person while on parole shall remain in the legal custody of the institution from which the person was released, but shall be subject to the orders of the board. The board shall furnish to each inmate as a prerequisite to release under its supervision a written statement of the conditions of parole that shall be accepted and agreed to by the inmate as evidenced by the inmate's signature affixed to a duplicate copy to be retained in the files of the board. The board shall also require as a prerequisite to release the submission and approval of a parole plan. If an inmate refuses to affix the inmate's signature to the written statement of the conditions of parole or does not have an approved parole plan, the inmate shall not be released and shall remain in the custody of the institution in which the inmate has served the inmate's sentence, excepting parole, until such time as the period of parole the inmate was required to serve, less meritorious deductions, if any, expires, at which time the inmate shall be released from that institution without parole, or until such time that the inmate evidences acceptance and agreement to the conditions of parole as required or receives approval for the inmate's parole plan or both. Time served from the date that an inmate refuses to accept and agree to the conditions of parole or fails to receive approval for the inmate's parole plan shall reduce the

period, if any, to be served under parole at a later date. If the district court has ordered that the inmate make restitution to a victim as provided in Section 31-17-1 NMSA 1978, the board shall include restitution as a condition of parole. The board shall also personally apprise the inmate of the conditions of parole and the inmate's duties relating thereto.

F. When a person on parole has performed the obligations of the person's release for the period of parole provided in this section, the board shall make a final order of discharge and issue the person a certificate of discharge.

G. Pursuant to the provisions of Section 31-18-15 NMSA 1978, the board shall require the inmate as a condition of parole:

(1) to pay the actual costs of parole services to the adult probation and parole division of the corrections department for deposit to the corrections department intensive supervision fund not exceeding one thousand eight hundred dollars (\$1,800) annually to be paid in monthly installments of not less than twenty-five dollars (\$25.00) and not more than one hundred fifty dollars (\$150), as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised parole costs shall not be waived unless the

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board holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the board waives the defendant's payment of the supervised parole costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the board and the board shall hold an evidentiary hearing to determine whether the waiver should be rescinded; and

(2) to reimburse a law enforcement agency or local crime stopper program for the amount of any reward paid by the agency or program for information leading to the inmate's arrest, prosecution or conviction.

H. The provisions of this section shall apply to all inmates except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act."

Section 5. REPEAL.--Sections 31-14-1 through 31-14-16, Section 31-18-14.1, Section 31-20A-1, Sections 31-20A-2.1 through 31-20A-4 and Section 31-20A-6 NMSA 1978 (being Laws 1929, Chapter 69, Sections 1 through 10, Laws 1955, Chapter 127, Section 1, Laws 1979, Chapter 150, Section 9, Laws 1955, Chapter 127, Sections 3 and 4, Laws 1929, Chapter 69, Sections 12 and 13, Laws 2001, Chapter 128, Section 1, Laws 1979, Chapter 150, Section 2, Laws 1991, Chapter 30, Section 1 and

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Laws 1979, Chapter 150, Sections 4, 5 and 7, as amended) are repealed.

Section 6. APPLICABILITY.--The provisions of this act apply to crimes committed on or after July 1, 2009.

Section 7. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2009._____

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EXHIBIT 10



STATE OF NEW MEXICO
GOVERNOR BILL RICHARDSON



For Immediate Release
March 18, 2009

Contact: Gilbert Gallegos
505.476.2217

Governor Bill Richardson Signs Repeal of the Death Penalty

SANTA FE – Governor Bill Richardson today signed House Bill 285, Repeal of the Death Penalty. The Governor's remarks follow:

Today marks the end of a long, personal journey for me and the issue of the death penalty.

Throughout my adult life, I have been a firm believer in the death penalty as a just punishment – in very rare instances, and only for the most heinous crimes. I still believe that.

But six years ago, when I took office as Governor of the State of New Mexico, I started to challenge my own thinking on the death penalty.

The issue became more real to me because I knew the day would come when one of two things might happen: I would either have to take action on legislation to repeal the death penalty, or more daunting, I might have to sign someone's death warrant.

I'll be honest. The prospect of either decision was extremely troubling. But I was elected by the people of New Mexico to make just this type of decision.

So, like many of the supporters who took the time to meet with me this week, I have believed the death penalty can serve as a deterrent to some who might consider murdering a law enforcement officer, a corrections officer, a witness to a crime or kidnapping and murdering a child. However, people continue to commit terrible crimes even in the face of the death penalty and responsible people on both sides of the debate disagree – strongly – on this issue.

But what we cannot disagree on is the finality of this ultimate punishment. Once a conclusive decision has been made and executed, it cannot be reversed. And it is in consideration of this, that I have made my decision.

I have decided to sign legislation that repeals the death penalty in the state of New Mexico.

Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome

responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong.

But the reality is the system is not perfect – far from it. The system is inherently defective. DNA testing has proven that. Innocent people have been put on death row all across the country.

Even with advances in DNA and other forensic evidence technologies, we can't be 100-percent sure that only the truly guilty are convicted of capital crimes. Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants. 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.

And it bothers me greatly that minorities are overrepresented in the prison population and on death row.

I have to say that all of the law enforcement officers, and especially the parents and spouses of murder victims, made compelling arguments to keep the death penalty. I respect their opinions and have taken their experiences to heart -- which is why I struggled – even today – before making my final decision.

Yes, the death penalty is a tool for law enforcement. But it's not the only tool. For some would-be criminals, the death penalty may be a deterrent. But it's not, and never will be, for many, many others.

While today's focus will be on the repeal of the death penalty, I want to make clear that this bill I'm signing actually makes New Mexico safer. With my signature, we now have the option of sentencing the worst criminals to life in prison without the possibility of parole. They will never get out of prison.

Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution that keeps society safe.

The bill I am signing today, which was courageously carried for so many years by Representative Gail Chasey, replaces the death penalty with true life without the possibility of parole – a sentence that ensures violent criminals are locked away from society forever, yet can be undone if an innocent person is wrongfully convicted. More than 130 death row inmates have been exonerated in the past 10 years in this country, including four New Mexicans – a fact I cannot ignore.

From an international human rights perspective, there is no reason the United States should be behind the rest of the world on this issue. Many of the countries that continue to support

and use the death penalty are also the most repressive nations in the world. That's not something to be proud of.

In a society which values individual life and liberty above all else, where justice and not vengeance is the singular guiding principle of our system of criminal law, the potential for wrongful conviction and, God forbid, execution of an innocent person stands as anathema to our very sensibilities as human beings. That is why I'm signing this bill into law.

#30#

EXHIBIT 11

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New Mexico legislature votes to repeal the death penalty

New Mexico could be the 15th US state to outlaw capital punishment if the governor signs the bill into law

Associated Press
guardian.co.uk, Friday 13 March 2009 17.44 EDT

The state legislature voted today to repeal the death penalty, meaning New Mexico could become the 15th US state not to have capital punishment if the governor signs the bill into law.

Governor Bill Richardson has opposed a repeal in the past, but now says he would consider signing it. "I haven't made a final decision," the governor said this week.

The state senate voted 24-18 today in favour of the bill, which replaces capital punishment with a sentence of life without parole. The house approved it a month ago.

New Mexico, one of 36 states with capital punishment, has two men on death row whose sentences would not be affected by repeal.

The state has executed one man since 1960, convicted child killer Terry Clark in 2001.

New Jersey banned executions in 2007, the first state to do so since the US supreme court reinstated the death penalty in 1976.

Opponents of the death penalty said it does not deter murder and is administered unfairly, and that there's a risk of executing innocent people.

"As beautiful as our justice system is ... it is still a justice system of human beings, and human beings make mistakes," state senator Cisco McSorley, a Democrat from Albuquerque, said during nearly three hours of debate.

Death penalty supporters objected that murderers sentenced to life without parole could end up in the general prison population, and argued that locking up murderers for life could imperil corrections officers.

"There's no incentive for not killing a guard every time you get a chance," said state senator Rod Adair, a Republican.

He called capital punishment "a just penalty for the most heinous of crimes in our society".

Opponents of repeal also said the death penalty is an important tool for prosecutors, who had asked lawmakers not to pass the bill.

New Mexico was one of at least 11 states considering banning executions this year.

Repeal legislation has passed the state senate in Montana and awaits a house hearing. The state senate in Kansas is expected to debate a repeal bill on Monday.



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EXHIBIT 12

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 1/27/09
 SPONSOR Chasey LAST UPDATED 1/31/09 HB 285
 SHORT TITLE Abolish Death Penalty SB _____
 ANALYST C. Sanchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non- Rec	Fund Affected
Total	NA	Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Public Defender (PD)

Department of Corrections (DOC)

SUMMARY

Synopsis of Bill

House Bill 285 abolishes the death penalty by amending Section 31-18-14 NMSA 1978 and substituting either a sentence of life or life without possibility of release or parole for a death sentence.

HB 285 amends Section 31-20A-2 NMSA 1978 to remove the subsection concerning the jury's determination of a life or death sentence and providing that upon a finding by the jury, beyond a reasonable doubt, that one or more Section 31-20A-5 aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without possibility of release or parole.

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Additionally, Section 31-21-10 NMSA 1978 is amended to provide that an inmate sentenced to life imprisonment without possibility of release or parole is not eligible for parole and shall remain incarcerated for life. The bill repeals Sections 31-14-1 through 31-14-16, 31-18-14.1, 31-20A-2.1 through 31-20A-4, and 31-20A-6 NMSA 1978, the sections relating to capital felony sentencing, capital felony cases heard by jury, and the execution of the death sentence.

HB 285 provides that the Act applies to crimes committed on or after July 1, 2009.

The effective date of the Act is July 1, 2009.

FISCAL IMPLICATIONS

According to the Public Defender Department, abolishing the death penalty would save New Mexico millions of dollars. The State Bar Task Force on the Administration of the Death Penalty in New Mexico Final Report,¹ 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 proceedings.² They require extensive trial level litigation as well as constitutionally and statutorily mandated appeal.³ Unlike any other criminal trial, these cases demand that a certified court reporter transcribe all proceedings.⁴ The survivors of the victim should be accorded particular respect.⁵ Jury selection is a long, 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.⁶ Due to changes in federal habeas corpus law, these cases must be long and thoroughly litigated in state court habeas proceedings as well.⁷ The Task Force ultimately recognized and recommended substantial changes to the way death penalty cases are prosecuted and defended in New Mexico, which may further increase costs.

Although a study has ever been done in New Mexico on the total costs of a death penalty case to the state (including the prosecution, the public defender, and the extensive drain on court resources.), a recent Duke University study done on North Carolina's costs found that the death penalty costs North Carolina \$2.16 million dollars per execution over a system that imposes life imprisonment.⁸

¹ State Bar of New Mexico Task Force to Study the Administration of the Death Penalty in New Mexico Final Report, submitted to the Board of Bar Commissioners January 23, 2004 (The Honorable Rudy S. Apodaca and Jerry Todd Wertheim, co-chairs), *available online at* http://www.nmbar.org/Content/NavigationMenu/Publications_Media/Reports_Surveys/Report_on_the_Death_Penalty/TskfrcdthPnltyRprt.pdf.

² *Id.* at 7-10. See also American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003).

³ *Id.* at 12-21.

⁴ *Id.* at 22.

⁵ *Id.*

⁶ State Bar of New Mexico Task Force to Study the Administration of the Death Penalty in New Mexico Final Report at 23; Telephone conversation with court administrator Fern Goodman, 2/1/05. Fern estimated that the costs to be \$20-25,000 for a death jury and \$7-8,000 for a non-death jury. This is her conservative estimate, and it does not include the costs of a change of venue or the cost of bringing witnesses or experts concerning juror exposure and venue.

⁷ *Id.* at 24.

⁸ P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University, May 1993.

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New Mexico does not receive much return on its death penalty investment. Fewer than half of the cases in which the prosecutor seeks the death penalty end in a death sentence. And, according to the National Bureau of Justice Statistics, 68% of all these convictions are overturned on appeal—the highest overturn rate in the United States.⁹ Therefore, fewer than one-fourth of all death penalty prosecutions ultimately result in a defendant going to death row in New Mexico. Finally, New Mexico's actual execution rate is even lower than the 12% of all convicted and sentenced murderers ultimately executed, nationally.¹⁰ Taking this data to its logical conclusion, there is only a 4.5% chance that any multi-million dollar death penalty prosecution will ever end in an execution in New Mexico.

According to the Administrative Office of the Courts, Moreover, to assemble a jury for a death penalty case, the district court will summon as many as one thousand (1,000) people. An estimate of what a death penalty case cost for the jury and witness fee fund is approximately \$20,000-\$25,000. In contrast, a non-death penalty murder case cost approximately \$7,000-\$8,000.

According to the Corrections Department the bill could result in a moderate placement burden on the Department. Because the Department currently operates all of its facilities at or near capacity, it would be difficult to continually absorb new offenders who have been sentenced to life without the possibility of release or parole. If large numbers of offenders are convicted and sentenced under the provisions of the bill, it may become necessary for the state to build new facilities or enlarge those already in existence.

SIGNIFICANT ISSUES

This bill would abolish the death penalty and amend existing criminal law regarding life sentences. Specifically, the bill provides that persons sentenced to life imprisonment as a result of the commission of a capital felony where the jury found beyond a reasonable doubt that one or more aggravating circumstances existed would not be eligible for parole and would be required to remain incarcerated for the entirety of their natural lives. Thus, the bill will effectively establish the penalty of a life sentence without the possibility of release or parole for any offenders convicted of a capital felony with one or more aggravating circumstances. If the jury does not make the required finding that one or more aggravating circumstances exist, the offender will be sentenced to life imprisonment (and eligible for but not guaranteed parole after 30 full years in prison).

ADMINISTRATIVE IMPLICATIONS

Death penalty cases take up a considerable amount of judicial time because the district courts have to conduct not only a trial but a sentencing phase as well.

TECHNICAL ISSUES

There may be concern that the provisions for carrying out the death penalty, Sections 31-14-1 through 31-14-16 NMSA 1978, are repealed in the Act, despite the fact that there are currently inmates on death row.

⁹ U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2003," appendix Table 4, 2004.

¹⁰ U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2003," appendix Table 4, 2004.

OTHER SUBSTANTIVE ISSUES

As of April 1, 2008, the Death Penalty was authorized by 37 states, the Federal Government, and the U.S. Military. Those jurisdictions without the Death Penalty include 13 states and the District of Columbia. (Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin).

Capital punishment was suspended in the United States from 1972 through 1976 primarily as a result of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). In this case, the court found the imposition of the death penalty in a consolidated group of cases to be unconstitutional, on the grounds of cruel and unusual punishment in violation of the eighth amendment to the United States Constitution.

Capital punishment is often the subject of controversy. Opponents of the death penalty argue that it has led to the execution of innocent people, that life imprisonment is an effective and less expensive substitute, that it discriminates against minorities and the poor, and that it violates the criminal's right to life. Supporters believe that the penalty is justified for murderers by the principle of retribution, that life imprisonment is not an equally effective deterrent, and that the death penalty affirms the right to life by punishing those who violate it in the strictest form.

The Public Defender Department reports that this bill would greatly streamline the litigation and appeal of what are now death penalty cases, because it will eliminate the death penalty specific pre-trial appeals, the greatly expanded jury selection, and the bifurcated trial procedures (a guilt phase and a penalty phase trial) that are now required under the Capital Felony Sentencing Act to comply with the United States Constitution Eighth Amendment's prohibition against cruel and unusual punishment. Abolishment of the death penalty would also negate the Capital Felony Sentencing Act's detailed appellate review in the New Mexico Supreme Court.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The death penalty will remain legal in New Mexico.

CS/mt:svb

EXHIBIT 13

**Estimates of Time Spent in Capital and Non-Capital Murder Cases:
A Statistical Analysis of Survey Data from Clark County Defense Attorneys**

Terance D. Miethe, PhD.
Department of Criminal Justice
University of Nevada, Las Vegas
February 21, 2012

I. Introduction

A survey was designed to provide average estimates of the time spent at various stages of criminal processing for the defense of capital and non-capital murder cases. Defense attorneys were asked to use their personal experiences over the past three years to estimate the number of hours they spent in pretrial, trial, penalty, and post-conviction activities in a "typical" capital and non-capital murder case. Separate questions were asked about their experiences as "lead attorney" and "second chair" in these typical cases.

A total of 22 defense attorneys completed the survey. The largest group of survey respondents were attorneys within the Public Defender's office (n=10), followed by the Special Public Defender's office (n=9) and the Office of Assigned Counsel (n=3). To provide some context for the time estimates provided by these defense attorneys, this survey data was also supplemented with general case processing information on a sample of 138 murder cases sentenced in District Court between 2009 and 2011. The Clark County Court's electronic record system was used to identify these murder cases and to construct summary statistics on case processing (e.g., average time between court filing and sentencing; number of total meetings with parties present, number of orders and motions filed). These court statistics were analyzed separately for each major type of sentence (i.e., yearly maximum sentences, life with possibility of parole, life without possibility of parole, and death sentences).

For the survey data included in this report, the median score (i.e., the middle score of a distribution) is used as the average estimate of time spent at each stage of criminal processing. The median is the most appropriate measure for these analyses because (1) it minimizes the impact of extreme ratings and (2) the distribution of time estimates across respondents is not normally distributed. Under these conditions, the median, rather than the mean, is the appropriate summary measure of central tendency.

II. Survey Questions

The survey items included questions about pretrial, trial, penalty, and post-conviction activities. Definitions of these stages and activities within them were provided to reduce ambiguity in the attorney's time estimates.

Survey respondents were told that **pretrial phase activities** include "time spent up to jury selection including but not limited to consultation time with the client, witnesses, experts, etc; court time, document review and investigations." Hourly estimates were then elicited for their time spent as lead attorney and second chair attorney in all pretrial phase activities related to guilty and penalty in a "typical" capital murder case. Similar hourly estimates were elicited for a "typical" non-capital murder case.

Trial phase activities were defined as "activities from jury selection to verdict including participation in *voir dire* and trial." Questions were included to estimate both the number of days and hours per day for trial phase activities as the lead attorney and as second chair attorney.

Penalty phase activities were defined as "activities after verdict through sentencing including preparation and participation in penalty/sentencing hearings." Questions were included to estimate both the number of days and hours per day for penalty phase activities as the lead attorney and as second chair attorney.

Post-conviction phase activities were defined as "time spent on any guilt-related and penalty-related activities after sentencing including appeals." Questions were included to estimate both the number of days and hours per day for post-conviction phase activities as the lead attorney and as second chair attorney.

III. Results of Time Estimates in Typical Cases

Median time estimates as lead attorney and second chair were computed for a "typical" capital and non-capital murder case for each stage of criminal processing. These comparisons of capital and non-capital cases were conducted for the entire sample and for specific groups (e.g., attorneys who have been lead attorney on 10 or more capital cases vs. attorneys with less experience in capital cases). The results of these comparisons are described below and summarized in Tables 1 and 2.

1. Pretrial Phase Activities:

- The median time estimate as lead attorney for pretrial phase activities was **1,075 hours** in a typical capital murder case and **461 hours** in a typical non-capital murder case. This time differential as lead attorney was **614 hours** longer for pretrial activities in capital than non-capital cases (see Panel A of Table 1).
- The median time estimate as second chair attorney for pretrial phase activities was **685 hours** in a typical capital murder case and **351 hours** in a typical non-capital murder case. This time differential as second chair attorney was **334 hours** longer for pretrial activities in capital than non-capital cases (see Panel B of Table 1).

- The median time estimates as lead attorney and second chair attorney for pretrial phase activities was **1,760 hours** in a typical capital murder case and **812 hours** in a typical non-capital murder case. This time differential as lead attorney and second chair attorney was **948 hours** longer for pretrial activities in capital than non-capital cases (see Panel C of Table 1).
- For both estimates as lead attorney and second chair attorney, penalty-related activities accounted for most of the time spent in the pretrial phase in capital cases. However, guilt-related activities were the primary source of time spent for both lead attorneys and second chair attorneys in the pretrial phase in non-capital cases.

2. Trial Phase Activities:

- The median time estimate as lead attorney for trial phase activities was **168 hours** in a typical capital murder case and **110 hours** in a typical non-capital murder case. This time differential as lead attorney was **58 hours** longer for trial activities in capital than non-capital cases (see Panel A of Table 1).
- The median time estimate as second chair attorney for trial phase activities was **180 hours** in a typical capital murder case and **110 hours** in a typical non-capital murder case. This time differential as second chair attorney was **70 hours** longer for trial activities in capital than non-capital cases (Panel B of Table 1).
- The median time estimates as lead attorney and second chair attorney for trial phase activities was **348 hours** in a typical capital murder case and **220 hours** in a typical non-capital murder case. This time differential as lead attorney and second chair attorney was **128 hours** longer for trial activities in capital than non-capital cases (see Panel C of Table 1).

3. Penalty Phase Activities:

- The median time estimate as lead attorney for penalty phase activities was **56 hours** in a typical capital murder case and **12 hours** in a non-capital murder case. This time differential as lead attorney was **44 hours** longer for penalty phase activities in capital than non-capital cases (see Panel A of Table 1).
- The median time estimate as second chair attorney for penalty phase activities was **58 hours** in a typical capital murder case and **12 hours** in a typical non-capital murder case. This time differential as second chair attorney was **46 hours** longer for penalty phase activities in capital than non-capital cases (see Panel B of Table 1).

- The median time estimates as lead attorney and second chair attorney for penalty phase activities was **114 hours** in a typical capital murder case and **24 hours** in a typical non-capital murder case. This time differential as lead attorney and second chair attorney was **90 hours** longer for penalty phase activities in capital than non-capital cases (see Panel C of Table 1).

Table 1: Median Time Estimates (in hours) as Lead Attorney and Second Chair Attorney by Type of Murder Case			
A. Lead Attorney Estimates:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	1,075	461	+ 614
Trial	168	110	+ 58
Penalty	56	12	+ 44
Post-Conviction	48	18	+ 30
TOTAL:	1,347 hours	601 hours	+ 746 hours
B. Second Chair Attorney Estimates:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	685	351	+ 334
Trial	180	110	+ 70
Penalty	58	12	+ 46
Post-Conviction	28	13	+ 15
TOTAL:	951 hours	486 hours	+ 465 hours
C. Both Lead Attorney and Second Chair Attorney Estimates Combined:			
Stage	Capital Cases	Non-Capital Cases	Difference
Pretrial	1,760	812	+ 948
Trial	348	220	+ 128
Penalty	114	24	+ 90
Post-Conviction	76	31	+ 45
TOTAL:	2,298 hours	1,087 hours	+ 1,211 hours

4. Post-Conviction Phase Activities:

- The median time estimate as lead attorney for post-conviction phase activities was **48 hours** in a typical capital murder case and **18 hours** in a typical non-capital murder case. This time differential as lead attorney was **30 hours** longer for post-conviction phase activities in capital than non-capital cases (see Panel A of Table 1).
- The median time estimate as second chair attorney for post-conviction phase activities was **28 hours** in a typical capital murder case and **13 hours** in a typical non-capital murder case. This time differential as second chair attorney was **15 hours** longer for post-conviction phase activities in capital than non-capital cases (see Panel B of Table 1).
- The median time estimates as lead attorney and second chair attorney for post-conviction phase activities was **76 hours** in a typical capital murder case and **31 hours** in a typical non-capital murder case. This time differential as lead attorney and second chair attorney was **45 hours** longer for post-conviction activities in capital than non-capital cases (see Panel C of Table 1).

5. Overall Time Estimates Across All Stages:

- The median time estimate as lead attorney across all stages of criminal processing was **1,347 hours** in a typical capital murder case and **601 hours** in a typical non-capital murder case. This overall time differential as lead attorney was **746 hours** longer in capital than non-capital cases (see Panel A of Table 1).
- The median time estimate as second chair attorney across all stages of criminal processing was **951 hours** in a typical capital murder case and **486 hours** in a typical non-capital murder case. This overall time differential as second chair attorney was **465 hours** longer in capital than non-capital cases (see Panel B of Table 1).
- The median time estimates as lead attorney and second chair attorney across all stages of criminal processing was **2,298 hours** in a typical capital murder case and **1,087 hours** in a typical non-capital murder case. This overall time differential as lead attorney and second chair attorney was **1,211 hours** longer in capital than non-capital cases (see Panel C of Table 1).

6. Average Time Estimates by Attorney's Legal Experience in Capital Cases:

- Capital murder cases were estimated to be more time intensive than non-capital murder cases at each stage of criminal processing for both attorneys who have been lead counsel in 10 or more capital cases and those attorneys with less experience in capital cases (see Table 2).
- For defense attorneys with the greater legal experience in capital cases, the average estimated time spent as lead attorney in pretrial activities was **340 hours** longer than the time estimate for lead attorneys in non-capital murder cases. For defense attorneys with less experience, this average time differential in pretrial activities by type of murder case was **659 hours** longer in capital murders. Regardless of their level of legal experience as lead attorney, the average time estimates for trial and penalty phase activities were between **36 and 63 hours** longer for capital cases (see Table 2).

Table 2: Median Time Estimates (in hours) as Lead Attorney by Legal Experience			
Stage	Capital Cases	Non-Capital Cases	Difference
<u>Pretrial:</u>			
More Experience	650	310	+ 340
Less Experience	1,125	466	+ 659
<u>Trial:</u>			
More Experience	168	126	+ 42
Less Experience	138	96	+ 42
<u>Penalty:</u>			
More Experience	84	21	+ 63
Less Experience	48	12	+ 36

IV. Deriving Cost Projections from Time Estimates

It is possible to generate relative cost projections for defense activities in capital and non-capital murder cases by (1) assigning hourly wage estimates for defense attorneys' time estimates, (2) using the median time estimates from defense attorneys as our best estimate of hourly workload in these cases, and (3) multiplying the product of these two estimates by the number of capital cases currently pending in Clark County.

The following information is used to provide a preliminary estimate of the relative financial costs for the defense of capital cases beyond the costs incurred if they were prosecuted as non-capital cases:

1. Estimated average time spent as lead attorney across all stages of criminal processing in a typical capital murder case (**1,347 hours**) and a typical non-capital murder case (**601 hours**).
2. Estimated average time differentials as second chair attorney across all stages of criminal processing in a typical capital murder case (**951 hours**). Second chair attorneys are not required in non- capital murder case.
3. Estimated cost of \$100 per hour for a public defender attorney and \$125 per hour for a private defense attorney through the Office of Appointed Counsel.
4. The number of pending capital cases currently in Clark County (n=80). 45 of these 80 pending cases are represented by public defenders (through the Clark County Public Defender's Office and Special Public Defenders). 35 of these 80 pending cases are represented by defense attorneys assigned by the Clark County Office of Appointed Counsel.

Based on these specifications, the estimated cost differentials for defense counsel in capital and non-capital cases are summarized in Table 3.

These estimated cost differentials suggest that between **\$170,000 and \$212,000 per case** is spent for the defense of a capital murder case beyond the costs that would have incurred if the case were prosecuted as a non-capital murder (see Rows E and F of Table 3). When these estimates of the cost differential per case are applied to the 80 capital cases currently pending in Clark County, the overall cost saving differential for defense counsel would be about **\$15 million** if these cases were prosecuted as non-capital murders (see last row of Table 3).

It is important to note that this statistical extrapolation does not cover the full array of time spent in capital cases by other court officials (e.g. judges, prosecutors, jurors), staff and administrative personnel, mitigation specialists, investigators, and expert witnesses. It also does not take into account the additional costs of capital litigation that are associated with state/federal appeals and the extra costs of imprisonment of death-eligible inmates pending trial and sentencing. The possible benefits of capital punishment are also not factored into this extrapolation (e.g., the retributive value of capital punishment, its potential deterrent effect on other murders, and the value of "notice of intent" filings for capital charges in reducing trial costs by encouraging guilty pleas for life sentences). Given these major omissions in the present analysis, a more comprehensive study is required for estimating the overall costs and benefits of capital litigation in this jurisdiction across all groups involved in the criminal processing and adjudication of these cases.

Table 3: Estimated Costs for Defense Attorneys in Capital and Non-Capital Murder Cases (per case and projected cost savings for pending cases)

1. Defense Attorney Costs Per Case:

A. Defense Attorney (Public Defender):

Capital Murder Case [Formula = Hours as Lead + Hours as 2nd Chair) x \$100 per hr]
 = (1,347 + 951) x \$100 = **\$229,800 per capital case.**

B. Private Defense Attorney (Office of Assigned Counsel):

Capital Murder Case [Formula = Hours as Lead + Hours as 2nd Chair) x \$125 per hr]
 = (1,347 + 951) x \$125 = **\$287,250 per capital case.**

C. Defense Attorney (Public Defender):

Non-Capital Murder Case [Formula = Hours as Lead Attorney) x \$100 per hr.]
 = (601) x \$100 = **\$60,100 per non-capital case.**

D. Private Defense Attorney (Office of Assigned Counsel):

Non-Capital Murder Case [Formula = Hours as Lead Attorney) x \$125 per hr.]
 = (601) x \$125 = **\$75,125 per non-capital case.**

2. Difference in Costs Per Capital and Non-Capital Case:

[Formula = costs per capital case - costs per noncapital case]

E. Public Defenders as Defense Attorney:

Difference Per Case [Row A - Row C] = \$229,800 - \$60,100 = **\$169,700 per case.**

F. Private Assigned Counsel as Defense Attorney:

Difference Per Case [Row B - Row D] = \$287,250 - \$75,125 = **\$212,125 per case.**

3. Projected Cost Differential for Defense Counsel in All Pending Capital Cases

Cost Saving Differential for Defense Attorneys if all Pending Capital Cases in Clark County were Prosecuted as Non-Capital Cases:

[Formula: **Row E** x (N cases pending) + **Row F** x (N cases pending)]

$$= [\$169,700 \times 45] + [\$212,125 \times 35] = \$7,636,500 + \$7,424,375 = \textbf{\$15,060,875}$$

V. Profile of Court Processing in Murder Cases in Clark County (2009-2011)

To provide some context for understanding these estimates of time spent in capital and non-capital litigation, a supplemental analysis of court processing data was conducted. This supplemental involved 138 murder cases that lead to convictions and sentencing between 2009 and 2011. Average estimates of court processing time (from initial filing dates to sentencing) and the number of court hearings/meetings, order, and motions were recorded. These court processing outcomes were then compared for cases in which the pronounced sentence involved the following penalties: (1) a maximum years of imprisonment excluding life and death sentences (N=68 cases), (2) life sentences with the possibility of parole (n= 44 cases), (3) life without the possibility of parole (n= 21), and (4) death sentences (n= 5 cases). The results of these analyses are summarized in Table 4.

As shown in Table 4, murder cases that ultimately result in a death sentence involve far more court-related activities than murder cases that lead to a life sentence or a maximum sentence of less than life or death. In particular, all death penalty convictions occurred from trials (versus < 50% were trial convictions in non-death sentence cases). The average death penalty case took about 3 years (1,107 days) between the initial filing of these charges by the prosecution and sentencing, whereas this court processing time was substantially lower in all murder cases that did not result in a death sentence (see Table 4, Line 2). The average number of separate court appearances, orders filed, and motions was also considerably greater in murder cases resulting in a death sentence than other penalties.

Table 4: Average Court Processing Outcomes in 127 Murder Cases Resulting in Conviction by Type of Sentence (Clark County, 2009-2011)					
Case Outcome	Years*	Life With	Life W/O	Death	All Cases
% Convicted by Trial versus Guilty Plea:	5.9 %	22.7 %	47.6 %	100 %	21.0 %
# of Days between Initial Filing and Sentencing:	387 days	732 days	887 days	1,107 days	599 days
# of Separate Court Appearances/Meetings:	9.3	20.9	27.9	35.2	16.8
# of Separate Orders Filed to the Court:	3.6	10.1	12.6	20.0	7.6
# of Separate Motion Filed to the Court:	5.4	16.6	24.4	30.0	12.8
Total # of Cases with this Sentence:	68	44	21	5	138
Note: * Years include any sentence in which a specific maximum number of years of imprisonment was pronounced (excluding life and death sentences).					

These average statistics from the Clark County Court's public record system provide some basis for gaining a preliminary understanding of the time and cost differentials between capital and non-capital cases that were found in the survey of defense attorneys. A more complete analysis of the reasons for these cost differentials, however, requires a more comprehensive study of capital and non-capital cases.

VI. Disposition of "Notice of Intent" Cases in Clark County (2009-2011)

A final summary of murder case processing derived from the Clark County Court's public record system involves the final disposition of cases in which a "Notice of Intent to Seek the Death Penalty" was filed by the prosecutor's office. In this sample of 138 murder cases, a "notice of intent" was filed in 35 cases. The final disposition of these 35 cases is summarized in Table 5.

Table 5: Final Disposition of Murder Cases in which a "Notice of Intent to Seek the Death Penalty" was Filed (Clark County, 2009-2011)		
<i>Case Outcome</i>	<i>Number of Cases</i>	<i>Percent Distribution</i>
Charges Dismissed	1	2.8 %
Specific Number of Years Given*	5	14.3 %
Life <u>With</u> Possibility of Parole	7	20.0 %
Life <u>Without</u> Possibility of Parole	17	48.6 %
Death Sentence	5	14.3 %
Total	35	100.0 %
Note: * Years include any sentence in which a specific number or range of years of imprisonment was pronounced (excluding life and death sentences).		

As shown in Table 5, nearly half (49%) of the cases in which a "notice of intent" was filed ultimately resulted in a sentence of life without the possibility of parole. The next most common disposition was a sentence of life with the possibility of parole (20%). A death sentence was the final disposition in only 5 of the 35 cases (14%) in which a "notice of intent to seek a death sentence" was initially filed.