



# NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT

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JANUARY 2007



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

## State of New Jersey

### NEW JERSEY DEATH PENALTY STUDY COMMISSION

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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

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## STATEMENT FROM THE CHAIRMAN

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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.

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# MEMBERS OF THE NEW JERSEY DEATH PENALTY STUDY COMMISSION

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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

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## COMMISSION STAFF

Gabriel R. Neville  
*Commission Aide*

Miriam Bavati  
*Commission Aide*

Debra L. Mayberry  
*Secretary*

Office of Legislative Services  
Judiciary Section

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## EXECUTIVE SUMMARY

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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.



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## FORWARD

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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;<sup>1</sup> 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

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<sup>1</sup> 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))<sup>2</sup>.

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).

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<sup>2</sup> 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

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## COMMISSION HEARINGS

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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](http://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)

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## WORKING SESSION

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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](http://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

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## **FINDINGS**

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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.

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## FINDINGS OF THE NEW JERSEY DEATH PENALTY STUDY

### COMMISSION

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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.



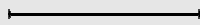
The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.



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

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

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*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 fluctuations<sup>3</sup> in the number of executions since capital punishment was reinstated in this country following the 1976 Gregg decision.

Richard Dieter<sup>4</sup>, Executive Director of the Death Penalty Information Center in

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<sup>3</sup>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>

<sup>4</sup> 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 penalty<sup>5</sup> 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.

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<sup>5</sup> 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 Scheidegger<sup>6</sup>, 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 Lillquist<sup>7</sup> 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.

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

<sup>7</sup> 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, <sup>n14</sup> 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.

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<sup>n14</sup> 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. Ramseur 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 Lillquist<sup>8</sup>. 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.<sup>9</sup> The Commission also heard testimony from Professor Robert Blecker<sup>10</sup> 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

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

<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

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.

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

## ISSUE 2

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### 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

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*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 Krakora<sup>12</sup>, 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

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<sup>12</sup> 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. Johnson<sup>13</sup>, 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.

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



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WHETHER THE DEATH PENALTY IS CONSISTENT WITH EVOLVING  
STANDARDS OF DECENCY

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

Patrick Murray<sup>14</sup>, 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.

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<sup>14</sup>Oral 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. Smith<sup>15</sup>, 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 Zelizer<sup>16</sup> 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.”

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<sup>15</sup> 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.

<sup>16</sup> 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.”<sup>17</sup> Similarly, Claudia Van Wyk testified that regarding the death penalty in New Jersey: “prosecutorial charging decisions have dropped off dramatically over time.”<sup>18</sup>

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

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

## ISSUE 4

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### 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

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*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.<sup>19</sup> 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

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<sup>19</sup> 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.

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... 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.<sup>20</sup>

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.<sup>21</sup>

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

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

<sup>21</sup> 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.”<sup>22</sup>

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.<sup>23</sup>

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

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

## ISSUE 5

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### 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

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*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.<sup>24</sup>

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

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<sup>24</sup>Report 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).<sup>25</sup>

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."<sup>26</sup>

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

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<sup>25</sup> 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.

<sup>26</sup> 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?”<sup>27</sup>

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

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<sup>27</sup> 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

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### WHETHER THE PENOLOGICAL INTEREST IN EXECUTING SOME OF THOSE GUILTY OF MURDER IS SUFFICIENTLY COMPELLING THAT THE RISK OF AN IRREVERSIBLE MISTAKE IS ACCEPTABLE

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*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 Scheck<sup>28</sup>, 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.

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

Kate Hill Germond<sup>29</sup>, 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 Peterson<sup>30</sup> 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.

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

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

As Professor Lillquist<sup>31</sup> 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 Thompson<sup>32</sup> 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.

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

<sup>32</sup> 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 experience<sup>33</sup>.)

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

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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

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*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 Flax<sup>34</sup>, whose husband Irving Flax was kidnapped and murdered by John Martini; Sharon Hazard-Johnson<sup>35</sup>, whose parents Richard and Shirley Hazard were both murdered by Brian Wakefield in a home-invasion robbery; and Patricia Harrison<sup>36</sup>, 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.)

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

<sup>35</sup> 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.

<sup>36</sup> 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 Barlieb<sup>37</sup>, 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 Pompelio<sup>38</sup>, 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.

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

<sup>38</sup> 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 Post<sup>39</sup>, 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 Piper<sup>40</sup> 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,<sup>41</sup> 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:

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

<sup>40</sup> 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.

<sup>41</sup> 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. Gibbons<sup>42</sup>, 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.

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<sup>42</sup> 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,<sup>43</sup> 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 . .

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<sup>43</sup> 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,<sup>44</sup> 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,

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<sup>44</sup> 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 Justice<sup>45</sup> 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

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<sup>45</sup> 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

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## RECOMMENDATIONS

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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.

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## RECOMMENDED LEGISLATION

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**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.

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

## MINORITY VIEW

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### 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,<sup>46</sup> 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.<sup>47</sup> 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

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<sup>46</sup> 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.

<sup>47</sup> 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."<sup>48</sup> 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.

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<sup>48</sup> 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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## 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.

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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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Statement by Kathryn Schwartz.

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Statement by Clare Laura Hogenauer.

Statement by Honorable Joseph Azzolina.

Statement by Marilyn G. Zdobinski.

Statement by Sharon Hazard-Johnson.

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## WORKING SESSION

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*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

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## ABOUT THE MEMBERS OF THE COMMISSION

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### REVEREND M. WILLIAM HOWARD, JR., CHAIRMAN

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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.

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### JAMES P. ABBOTT

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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.

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### HONORABLE JAMES H. COLEMAN, JR.

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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.

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### EDWARD J. DE FAZIO

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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.

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**KATHLEEN GARCIA**

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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.

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**KEVIN HAVERTY**

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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.

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**EDDIE HICKS**

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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.

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**THOMAS F. KELAHER**

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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).

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**HONORABLE STUART RABNER**

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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.

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**HONORABLE JOHN F. RUSSO**

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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.

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**RABBI ROBERT SCHEINBERG**

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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.

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**YVONNE SMITH SEGARS**

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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.

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**MILES S. WINDER, III**

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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.

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## ACKNOWLEDGEMENTS

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### COMMISSION STAFF

Office of Legislative Services  
Judiciary Section

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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

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*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.*

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## ENABLING LEGISLATION OF THE COMMISSION

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### 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.

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## CURRENT MURDER STATUTE

### N.J.S.A. 2C:11-3

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#### 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.

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## COMMISSION WITNESSES

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### 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)