NOTES

HELL BENT ON INTENT: NEW JERSEY BROADENS THE CLASS OF DEATH ELIGIBLE DEFENDANTS

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I. Introduction

On April 26, 1983, a woman named Carol Peniston was beaten, sexually assaulted, and strangled to death in a shed in Asbury Park, New Jersey.[1] The New Jersey Supreme Court, examining defendant Marko Bey's actions as a whole, concluded that they "were so wantonly brutal that he could have intended only to cause death . . . ."[2] The court went on to uphold Bey's sentence of death for the horrifying murder of Carol Peniston, pursuant to New Jersey's death penalty statute.[3] This sentence was a huge victory for

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1 State v. Bey, 610 A.2d 814, 819 (N.J. 1992).

2 *Id.* at 825.

3 *Id.* The New Jersey death penalty statute is actually an amendment to the state murder statute, N.J. STAT. ANN. § 2C:11-3 (West 1982). *See* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 66 (1988). Pertinent sections of the statute at the time of the *Bey* decision, prior to the amendment, which will be discussed *infra* at notes 155-75 and accompanying text, read as follows:

> a. Except as provided in section 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 . . .
> (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 or criminal escape, 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:

the State, particularly in light of the fact that the New Jersey Supreme Court has upheld only three of thirty-four death sentences since capital punishment was reinstated in New Jersey in 1982.[4] In *Bey*, the Court held that the evidence was so dispositive of purposely or knowingly causing death, that it would have been virtually impossible for a jury to have found otherwise.[5]

The State was not as successful in proving this requisite *mens rea*[6] in a host of other cases, and in 1988 the New Jersey Supreme Court held that only those who knowingly or purposely cause

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(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. 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 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.

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 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 . . . .

N.J. STAT. ANN. § 2C:11-3 (West 1982).

[4] Robin Gary Fisher & Pat Politano, *Legislators Move to Extend Death Penalty*, COURIER NEWS, Jan. 6, 1993, at A-6. In addition to upholding the death sentence of Marko Bey, the New Jersey Supreme Court has upheld death sentences in two other cases: State v. Marshall, 613 A.2d 1059 (N.J. 1992) (upholding defendant's death sentence for financially procuring the murder of his wife); and State v. Martini, 619 A.2d 1208 (N.J. 1993) (upholding defendant's sentence of death for kidnapping and killing his victim by shooting him in the back of the head). The last person actually executed in New Jersey was Ralph Hudson, on Jan. 22, 1963. Marie Adrine, *High Court Upholds Two Death Sentences*, 1 N.J. LAW., No. 28, Aug. 3, 1992, at 1.

[5] *Bey*, 610 A.2d at 825.

[6] *Mens rea* is defined as "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfullness." BLACK'S LAW DICTIONARY 985 (6th ed. 1991).

death are subject to capital punishment.[7] Numerous death sentences were vacated for failure to demonstrate an intent to kill, while others with seemingly similar facts and circumstances were not reversed.[8] Frustrated by what they considered a capricious and perverted administration of the law, the New Jersey Legislative and Executive Branches set out to curb the activist High Court by passing legislation that would effectively invalidate this particular line of cases.

The following discussion explores the fascinating world of capital punishment in New Jersey, extending as far back as the seventeenth century. The note will then examine the cases that prompted the Assembly and Senate to amend the State Constitution and murder statute to effectively subject those who commit serious bodily injury resulting in death to capital punishment proceedings. This note then analyzes the actual amendments to the Constitution and state murder statute. The legislators claim that these amendments comport with what they intended all along—that those who knowingly or purposely cause death *or* serious bodily injury resulting in death should be punished in an equal fashion. Finally, some brief criticisms of the legislation, as provided by representatives of the New Jersey State Public Defender's Office, will be discussed.

II. A History of The Death Penalty in New Jersey

A. *Early History*

Capital punishment in the state of New Jersey may be traced as far back as the early Colonial settlement days.[9] The first court to preside over capital punishment cases, the Court of Oyer and Terminer, was established by the West Jersey legislative body in 1693.[10] It was not until 1796, however, that the first comprehensive crimes act was enacted.[11] This act established death as the punishment for

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[7] State v. Gerald, 549 A.2d 792 (N.J. 1988), discussed *infra* at notes 54-92 and accompanying text.

[8] Most were, however, reversed on some other grounds; *see infra* note 149.

[9] Hon. Irwin I. Kimmelman, *The Death Penalty in New Jersey*, N.J. LAW., No. 103, Spring 1983, at 9.

[10] Bienen, *supra* note 3, at 47. New Jersey was divided into East and West Jersey prior to 1702. *Id.* Prior to the establishment of the Court of Oyer and Terminer, the legislature was vested with the authority to preside over capital punishment cases. *Id.*

[11] Act of Mar. 18, 1796, 1821 REV. LAWS 244, § 1 et seq. [hereinafter *Act of 1796*].

murder.[12] A later provision of the act included the first statutory definition of felony-murder[13] in New Jersey, which was punishable by death as well.[14] In addition to serving the punishment for murder, death was the penalty for eleven other crimes under the 1796 statute.[15]

In 1839, murder was divided into two degrees:[16] first degree, or pre-meditated murders,[17] were punishable by death;[18] second degree murders, which were all other murders,[19] were punishable

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[12] *Id.* The statute stated "[t]hat every person, who shall commit murder, or shall aid, abet, counsel, hire, command, cause or procure any person or persons to commit murder, shall, in being thereof convicted or attained, suffer death . . . ." *Act of 1796, supra* note 11, at 245 § 3. The statute included a special provision which allowed the executed body to be dissected by a court surgeon. *Id.*

[13] *See infra* note 14. The felony-murder doctrine comes from the common law, and refers to the general principle that

> one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder (*e.g.* a homicide committed during an armed robbery). While some states still follow the common law rule, today the law of felony murder varies substantially throughout the country, largely as a result of efforts to limit the scope of the rule. Jurisdictions have limited the rule in one or more of the following ways: (1) by permitting its use only as to certain types of felonies; (2) by more strict interpretation of the requirement of proximate or legal cause; (3) by a narrower construction of the time period during which the felony is in the process of commission; (4) by requiring that the underlying felony be independent of the homicide.

BLACK'S LAW DICTIONARY 617 (6th ed. 1991).

[14] *Act of 1796, supra* note 11, at 262 § 66, states that

> if any person or persons, in committing or attempting to commit sodomy, rape, arson, robbery, or burglary, or any unlawful act against the peace of this state, of which the probable consequence, may be bloodshed, shall kill another, or if the death of any one shall ensue from the committing or attempting to commit any such crime or act as aforesaid . . . then such person . . . on conviction . . . shall suffer death.

Id.

[15] Bienen, *supra* note 3, at 53. The other eleven crimes carrying the death sentence were "treason, petit treason, a second offense of manslaughter, sodomy, rape, arson, burglary, robbery, or forgery, permitting a capital defendant to escape, and aiding in the rescue of a capital prisoner." *Id.* at 53 n.68.

[16] Act of Mar. 7, 1839, 1839 N.J. Laws 147 [hereinafter *Act of 1839*].

[17] *Id.* "[A]ll murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, shall be deemed murder of the first degree . . . ." *Id.* at 148 § 1. Felony-murder was likewise classified as first degree murder, punishable by death as well. *Id.* § 2. *See also* Hugo A. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 13 (1964).

[18] *Act of 1839, supra* note 16, at 148 §2.

[19] *Id.* § 1.

by a prison term at hard labor.[20] In 1893, the criminal code was revised to introduce the *non vult* plea[21] to murder.[22] This remained in effect until 1972, when it was declared unconstitutional by the New Jersey Supreme Court.[23]

The twentieth century witnessed a number of significant changes in the administration of capital punishment in New Jersey. In 1906, electrocution replaced hanging as the method of execution.[24] In 1916, the State Legislature vested the jury with the authority to choose between the death sentence or life imprisonment with hard labor after having convicted a defendant of first degree murder.[25] In 1933, kidnapping for ransom was added to the list of

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20 *Id.* § 2. "[E]very person convicted of murder of the second degree, shall suffer imprisonment, at hard labor, for any term, not less than five, nor more than twenty years." *Id.*

21 The *non vult* plea is defined as "a plea similar to *nolo contendere* (q.v.) and carrying implications of a plea of guilty." BLACK'S LAW DICTIONARY 1059 (6th ed. 1991). A plea of *nolo contendere* is defined as a "[t]ype of plea which may be entered with leave of a court to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it." *Id.* at 1048. Since the penalty for second degree murder was only a prison sentence, the defendant who pled *non vult* to first degree murder escaped execution, while the defendant who chose a jury trial ran the risk of a death sentence. Edward Devine et al., *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L. J. 261, 269 (Winter 1984).

22 Act of Mar. 1, 1893, ch. 36, 1893 N.J. Laws 82-83. In reference to a charge of first degree murder, the statute read, in pertinent part, "that nothing herein contained shall prevent the accused of pleading non vult or nolo contendere to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder in the second degree." *Id.*

23 State v. Funicello, 286 A.2d 55 (N.J. 1972). *See infra* note 32 for facts of the case and court's holding.

24 Act of Apr. 4, 1906, ch. 79, 1906 N.J. Laws 112. The provision provided that "[t]he punishment of death must, in every case, be inflicted by causing to pass through the body of the convict, a current of electricity of sufficient intensity to cause death as speedily as possible." *Id.* Then-Governor Edward Stokes signed a bill into law that not only required that electrocution be the method of execution, but also stipulated that the execution take place at the State Prison in Trenton. *See* Bedau, *supra* note 17, at 1. Since 1835, executions had taken place at the county jail yards. *Id.* The current method of execution in New Jersey is by lethal injection. N.J. ADMIN. CODE tit. 10A, § 23-1 et seq. (1987). The execution must still be carried out at the State Prison. *Id.* § 23-2.1.

25 Devine, *supra* note 21, at 270. "Every person convicted of murder in the first degree . . . shall suffer death unless the jury at the time of rendering the verdict in such case shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed . . . ." Act of Mar. 29, 1916, ch. 270, 1916 N.J. Laws 576.

capital crimes[26] following the highly publicized trial of Bruno Hauptmann, the man accused of kidnapping the Lindbergh baby.[27] He was convicted and sentenced to death for felony-murder.[28]

In 1937, the last major revision of the criminal code prior to the passage of the 1979 Code of Criminal Justice[29] was undertaken. The revision specified four capital crimes,[30] and continued to classify murder in the first and second degree, with the jury determin-

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[26] The provision held that

> any person or persons who shall kidnap or steal or forcibly take away any man, woman or child, . . . and shall demand for the return . . . any money or any valuable thing of any value whatsoever, . . . upon conviction shall suffer death, unless the jury shall by their verdict and as part thereof . . . recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed.

Act of Sept. 5, 1933, ch. 374, 1933 N.J. Laws 1058.

[27] Bienen, *supra* note 3, at 59. The child of Colonel and Mrs. Charles A. Lindbergh was kidnapped from the Lindbergh home in East Amwell, Hunterdon County, New Jersey on March 1, 1932. *Id.* at 59 n.105. Located on the windowsill of the baby's room was a ransom note, allegedly in the handwriting of Hauptmann, demanding $50,000. According to the court, this ransom note

> led to negotiations, in the course of which a number of other notes were received; and on the evening of April 2 Dr. Condon, an agent of Col. Lindbergh, . . . met a man, who, as the state claimed and he testified, was the defendant, at a cemetary in the Bronx, the money was paid in bills capable of later identification, the parents having already received, as proof that the kidnapper had a child, a little sleeping suit which the child had on at the time of the kidnapping . . . . The baby himself was never returned, and, as shown to the satisfaction of the jury by the evidence, had long been dead. His mutilated and decomposed body was accidentally discovered on May 12 in a shallow grave several miles away in the adjoining county of Mercer. The state claimed, and evidence supported the claim, that the autopsy disclosed the baby had suffered three violent fractures of the skull and that death was instantaneous.

State v. Hauptmann, 180 A. 809, 813 (N.J.L. 1935). Hauptmann, a Bronx resident, was arrested on a charge of murder. The trial commenced on January 2, 1935, and continued through February 13, 1935. Hauptmann was convicted of murder in the first degree without jury recommendation of life imprisonment. *Id.* at 813. He was executed on April 3, 1936. Bedau, *supra* note 17, at 13.

[28] Bedau, *supra* note 17, at 13. Interestingly enough, Hauptmann's indictment failed to mention kidnapping or ransom, charging him instead with first degree felony-murder. *Id.* Arguing that the baby's death occurred during the course of a burglary, the predicate felony used for felony-murder purposes was larceny of the toddler's clothing. Bienen, *supra* note 3, at 60 n.105.

[29] Bienen, *supra* note 3, at 60. *See* N.J. REV. STAT. § 2:138-1 to -9 (1937).

[30] Bienen, *supra* note 3, at 60. These capital crimes were murder, kidnapping, treason, and assault upon the President and Vice President. *Id.*

ing the degree in each case.[31]

B. *Modern History*

The death penalty in New Jersey was declared unconstitutional by the New Jersey Supreme Court in 1972 with the case of *State v. Funicello.*[32] In that same year, the United States Supreme Court pronounced all existing state death penalty statutes unconstitutional in *Furman v. Georgia.*[33] In 1976, however, the Supreme Court held that a system that established firm sentencing guidelines for juries in capital punishment cases, rather than giving juries the unbridled discretion which had produced seemingly arbitrary death sentences, would pass constitutional muster.[34] In 1978, the New

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[31] *Id.* First degree murder maintained its premeditated, willful character from the 1839 definition of first degree murder. N.J. REV. STAT. § 2:138-2 (1937).

[32] 286 A.2d 55 (N.J. 1972). In *Funicello,* the defendant was convicted of the murder of Fred Palmarozza, a used car dealer. State v. Funicello, 231 A.2d 579, 581 (N.J. 1967). Funicello allegedly put down a $5 deposit on a $1,600 car, proceeded to fatally stab Palmarozza, and drove away in the car. *Id.* at 584. The jury found the defendant guilty of felony-murder, and Funicello was sentenced to death. *Id.* at 581. The Supreme Court affirmed his conviction and death sentence. *Id.* On rehearing, the New Jersey Supreme Court considered the constitutionality of the *non vult* plea to capital murder. State v. Funicello, 286 A.2d 55 (N.J. 1972). The court held that this "option" given to defendants under New Jersey's then-existing death penalty statute functioned to coerce guilty pleas, which violated the defendant's Sixth Amendment rights pursuant to the United States Constitution and the United States Supreme Court's holding in United States v. Jackson, 390 U.S. 570 (1968). *Funicello,* 286 A.2d at 55. The New Jersey Supreme Court consequently held that the death penalty in New Jersey was unconstitutional, and that "[a]ll pending and future indictments for murder shall be prosecuted on the basis that upon a jury's verdict for murder in the first degree, the penalty shall be life imprisonment." *Id.* at 59.

[33] 408 U.S. 238 (1972). In a *per curiam* opinion, the United States Supreme Court struck down all existing state death penalty statutes as being cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. *Id.* at 240. Central to this holding was the position of the five Justices who posited that the death penalty was imposed in an arbitrary fashion. Writing for the Court, Justice Douglas expressed his belief that capital punishment was imposed arbitrarily and disproportionately against the underprivileged. *Id.* at 242. Justices Stewart and White asserted that because capital punishment was applied so infrequently and arbitrarily, it failed to serve as an effective punishment. *Id.* at 309, 312. Justices Brennan and Marshall were the only Court members who opined that the death penalty is *per se* unconstitutional, arguing that it interferes with a person's sense of dignity and fails to comply with evolving standards of decency. *Id.* at 270, 329. The dissenters included Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist, each of whom questioned the constitutional basis for the plurality opinions.

[34] Devine, *supra* note 21, at 285. The case in which the Court made this pronouncement was Gregg v. Georgia, 428 U.S. 153 (1976). In *Gregg,* at issue was Georgia's post-*Furman* death penalty statute, which established a bifurcated procedure in

Jersey Legislature passed the Code of Criminal Justice, to take effect September 1, 1979, but without a capital punishment provision.[35] Instead, murder was defined as a first degree offense, carrying a prison sentence of thirty years with a fifteen year mandatory minimum.[36] Minor revisions of the Code in 1979 defined murder as an act that causes death or serious bodily injury resulting in death, requiring a purposeful or knowing intent.[37]

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capital cases—a guilt phase, followed by a sentencing phase. *Id.* at 163. At the sentencing phase, the defendant could not be sentenced to death unless the jury found the existence of at least one aggravating factor beyond a reasonable doubt. *Id.* at 165. All death sentences were to be reviewed by the Georgia Supreme Court. *Id.* at 167. The United States Supreme Court, in an opinion authored by Justice Stewart, upheld the Georgia statute, which provided the sentencing jury with coherent and narrowly-tailored guidelines for determining whether to sentence a given defendant to death. *Id.* at 206-207. The Court considered the re-enacted death penalty statutes of four other states in 1976 as well. Devine, *supra* note 21, at 281. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (striking down death penalty statute that eliminated all jury discretion, and made death sentence mandatory for first degree murder); Woodson v. North Carolina, 428 U.S. 280 (1976) (striking down death penalty statute that failed to provide jury with standards for imposing capital sentences, effectively usurping juror discretion altogether); Jurek v. Texas, 428 U.S. 262 (1976) (upholding death penalty statute that provided for bifurcated proceeding, in which the penalty phase jury must not only have found aggravating factors but must have answered three questions affirmatively before recommending the death sentence; statute also required judicial review of the sentence); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding bifurcated statutory scheme in capital cases, which provided for juror balancing of aggravating and mitigating factors, jury recommendation of punishment form, and judicial imposition of sentence after weighing of aggravating and mitigating factors; statute also provided for appellate review of all death sentences).

35 Act of Aug. 10, 1978, ch. 95, 1978 N.J. Laws 482, 540.

36 *Id.* at 541, 632.

37 Act of Aug. 29, 1979, ch. 178, 1979 N.J. Laws 664, 684. The Model Penal Code's definitions of criminal responsibility replaced common law definitions of intent in the Code of Criminal Justice. The Model Penal Code defines "purposely" and "knowingly" as follows:

> *Purposely.* A person acts purposely with respect to a material element of an offense when:
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> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
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> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
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> *Knowingly.* A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
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> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

On August 6, 1982, after a ten-year absence, capital punishment was reinstated in New Jersey[38] through the efforts of a majority of the State Legislature and the support of a newly-elected Governor, Thomas H. Kean.[39] Since the reinstatement, which came in the form of an amendment to the homicide statute defining murder,[40] there have been significant amendments to the law. Chapter 178 of the Laws of 1985[41] explicitly requires the prosecution to prove, beyond a reasonable doubt, the existence of any aggravating factors,[42] and stipulates that the jury find, again beyond a reasonable doubt, that all aggravating factors outweigh all mitigat-

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MODEL PENAL CODE § 2.02(a)-(b) (Proposed Official Draft, 1962).

Compare above definitions with those employed in N.J. STAT. ANN. § 2C:2-2(b)(1)-(2) (West 1982) (for similarities between the codes' culpability definitions).

38 Act of Aug. 6, 1982, ch. 111, 1982 N.J. Laws 555.

39 Governor Kean's predecessor, Governor Brendan Byrne, was a staunch opponent of the death penalty. Devine, *supra* note 21, at 272. He publicly declared his intention to veto any bill placed upon his desk that contained a capital punishment provision. *Id.* In 1977, Governor Byrne exercised a pocket veto that killed a bill that would have reinstated the death penalty in New Jersey that year. Kimmelman, *supra* note 9, at 10.

40 N.J. STAT. ANN. § 2C:11-3 (West 1982).

41 Act of June 10, 1985, ch. 178, 1985 N.J. Laws 536 (codified at N.J. STAT. ANN. § 2C:11-3 (West Supp. 1994)).

42 *Id.* at 539. N.J. STAT. ANN. § 2C:11-3(c)(2)(a) (West Supp. 1994) states:

> 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.

Id.

The aggravating factors are enumerated in N.J. STAT. ANN. 2C:11-3(c)(4) (West 1982):

> (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 offense by payment or promise of payment of anything of pecuniary value;
> (f) The murder was committed for the purpose of escaping detection,

ing factors before imposing a death sentence.[43] Chapter 178 likewise made substantive changes regarding the aggravating factors.[44]

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apprehension, trial, punishment or confinement for another offense committed by the defendant or another;
(g) The offense 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 or kidnapping; or
(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.

N.J. STAT. ANN. § 2C:11-3.

[43] 1986 *N.J. Laws*, at 539. N.J. STAT. ANN. § 2C:11-3(c)(3)(a)-(c) (West Supp. 1994) states:

(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.

Id.

The mitigating factors to be considered by the jury are enumerated in N.J. STAT. ANN. § 2C:11-3(c)(2)(5) (West 1982):

(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.

N.J. STAT. ANN. § 2C:11-3.

[44] Bienen, *supra* note 3, at 68-69. First, a prior murder conviction at trial could

Chapter 478 of the Laws of 1985[45] clarified that juveniles were not meant to be subject to capital sentencing,[46] and that the Supreme Court of New Jersey was required to hear all death sentence appeals.[47] Other amendments to date include a mandatory death sentence for leaders of narcotics trafficking networks who order others to commit murder,[48] and an amendment that would subject terrorists to the death penalty as well.[49]

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now be used as the factual predicate for the prior murder statutory aggravating factor. *Id.* at 68. Second, murder was added to the list of crimes enumerated in the felony aggravating factor. *Id.* at 68-69.

45 Act of Jan. 17, 1986, ch. 478, 1985 N.J. Laws 1935 (amending N.J. STAT. ANN. § 2C:11-3 (West Supp. 1994)).

46 N.J. STAT. ANN. § 2C:11-3(g) (West Supp. 1994); 1985 N.J. Laws at 1940. The provision states that "[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." *Id.*

47 *Id.* § 2C:11-3(e); 1985 N.J. Laws at 1940. The provision states:

> 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. 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.

N.J. STAT. ANN. § 2C:11-3(e) (West Supp. 1994).

48 ASSEMBLY COMM. SUBSTITUTE for A.50 and A.55, 205th Leg., 1st Sess. (1992) (codified at N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1994)). A leader of a narcotics trafficking network is defined in N.J. STAT. ANN. § 2C:35-3 (West Supp. 1994) as one who "conspires with others as an organizer, supervisor, financier or manager, to engage for profit in a scheme or course of conduct to unlawfully manufacture, distribute, dispense, bring into or transport in this State . . . any controlled dangerous substance . . . ." *Id.*

49 A.2390, 205th Leg., 2d Sess. (1993)(codified as amended at N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1994)). N.J. STAT. ANN. § 2C:11-3(c)(1) has been amended to read, in pertinent part, that

> a person shall be deemed to have committed the homicidal act by his own conduct within the meaning of this subsection if he purposely or knowingly causes death or serious bodily injury resulting in death in the course of causing or risking widespread injury as set forth in paragraph (1) or subsection a. of N.J.S. 2C:17-2.

Id.

N.J. STAT. ANN. § 2C:17-2(a)(1) (West Supp. 1994) states:

> A person who, purposely or knowingly, unlawfully causes an explosion, avalanche, collapse of a building, release or abandonment of poison gas, radioactive material or any other harmful or destructive substance, commits a crime of the second degree. A person who, purposely or knowingly, unlawfully causes widespread injury or damage in any manner commits a crime of the second degree.

The most recent amendment to the death penalty law was in response to a controversial New Jersey Supreme Court decision[50] and its progeny,[51] as well as a constitutional amendment intended to overturn that decision.[52] The amended law, meant to strengthen that constitutional amendment, was signed by Governor Florio on May 5, 1993, and subjects those who commit serious bodily injury resulting in death to the capital sentencing process.[53]

III. State v. Gerald *and Its Progeny*

On October 25, 1988, the New Jersey Supreme Court handed down the controversial opinion, *State v. Gerald.*[54] The legal principle set forth in this decision has been characterized as "a product of the New Jersey Supreme Court's invention,"[55] and has been criticized for "frustrating the enforcement of our capital punishment statute."[56] The *Gerald* decision, as well as a long line of cases employing its rationale, prompted the Legislative and Executive Branches to amend the State Constitution and murder statute to effectively invalidate the much criticized holding.[57]

The facts of *Gerald* are as follows. On Friday, August 13, 1982, the home of John Matusz, age eighty-nine, and his son Paul, age fifty-five, was burglarized by three intruders.[58] Paul Matusz was

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N.J. STAT. ANN. § 2C:17-2(a)(1).

50 State v. Gerald, 549 A.2d 792 (N.J. 1988).

51 *See, e.g.*, State v. Erazo, 594 A.2d 232 (N.J. 1991); State v. Harvey, 581 A.2d 483 (N.J. 1990); State v. Clausell, 580 A.2d 221 (N.J. 1990); State v. Long, 575 A.2d 435 (N.J. 1990); State v. Pennington, 575 A.2d 816 (N.J. 1990); State v. Coyle, 574 A.2d 951 (N.J. 1990); State v. Jackson, 572 A.2d 607 (N.J. 1990); State v. Davis, 561 A.2d 1082 (N.J. 1989).

52 N.J. CONST. art. I, § 12 (amended 1992).

53 A.2113, 205th Leg., 2d Sess. (1993)(codified as amended at N.J. STAT. ANN. § 2C:11-3(i) (West Supp. 1994)).

54 549 A.2d 792 (N.J. 1988).

55 *Amending the State Constitution to Provide That it is Not Cruel and Unusual Punishment to Impose the Death Penalty on Certain Persons, 1992: Public Hearing on ACR.20 Before the Assembly Judiciary, Law and Public Safety Comm.*, 205th Leg., 1st Sess. (1992), at 7x (statement of William F. Lamb, First Assistant Prosecutor, Middlesex County, appearing on behalf of the County Prosecutors' Association of New Jersey in support of ACR-20) [hereinafter *Assembly Comm. Hearing on ACR.20*].

56 *Id.* at 1x (statement of New Jersey State Attorney General Robert J. Del Tufo supporting ACR.20)

57 *See N.J. Assembly Statement to ACR.20*, 205th Leg., 1st Sess. (Feb. 13, 1992) [hereinafter *Assembly Statement*]; *N.J. Senate Judiciary Comm., Statement to ACR.20*, 205th Leg., 1st Sess. (May 4, 1992) [hereinafter *Senate Judiciary Statement*].

58 *Gerald*, 549 A.2d at 796.

struck in the face with a television set and was rendered unconscious.[59] He was rushed to the hospital, where he died less than an hour and a half after the initial attack.[60]

On August 16, 1982, an unknown informant notified the police that Walter Gerald and two accomplices were responsible for the Matusz murder.[61] That evening, Gerald was arrested,[62] but denied any involvement in the matter.[63] After failing a polygraph test, however, Gerald gave a full statement in which he admitted that he and two accomplices entered the Matusz home with the intention of stealing a television set.[64] He further admitted to helping his accomplices beat up on Paul Matusz, as well as to stepping on Paul's face as they left the house.[65]

On December 16, 1982, an Atlantic County Grand Jury handed down an indictment that charged Walter Gerald with knowing and purposeful murder.[66] During a two-week guilt-phase

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59 *Id.* Lottie Wilson, John's daughter, who had been staying with her father, was the first member of the household attacked. She claimed to have been "thrown to the floor, punched and kicked in the face, and then hurled into the bathroom. Mrs. Wilson recalled lying on the bathroom floor being stomped on a number of times about the face and chest . . ." by one of the intruders. *Id.* When Paul heard his sister's screams and came running to her aid, he was attacked at the foot of the staircase and struck in the face with a television set. John Matusz was beaten, dragged from his bed, and found bleeding profusely in the upstairs hallway. *Id.*

60 *Id.* The attack commenced slightly after 9:30 p.m., and Paul died in the emergency room at Shore Memorial Hospital at approximately 10:48 p.m. *Id.* at 796-97. According to the Atlantic County Medical Examiner, Paul's death resulted from severe blows to the head inflicted by fists and feet, causing cerebral concussions and a fractured nose. *Id.* at 797. John Matusz, who suffered bruises and lacerations of the face, died on October 3, 1982, without ever returning home. *Id.* Lottie Wilson, who suffered from face, neck, and chest injuries as a result of numerous blows, remained hospitalized through August 25, 1982, with a wired jaw for several weeks. *Id.*

61 *Id.* at 798.

62 *Id.* The police actually used two outstanding arrest warrants for failure to appear in municipal court on traffic tickets to arrest Gerald. *Id.* At the time of arrest, the authorities informed Gerald that they wished "to speak with him in connection with another matter." *Id.*

63 *Id.*

64 *Gerald*, 549 A.2d at 800.

65 *Id.* One of the accomplices, John Bland, who had been arrested subsequent to Gerald's confession, reported that after the murder, Gerald had told him that "he thought he had killed Paul Matusz because he had 'stomped him real bad.'" *Id.*

66 State v. Gerald, 549 A.2d 792, 801 (N.J. 1988). They additionally charged him with conspiracy to commit second degree burglary, second degree burglary, conspiracy to rob John Matusz, Paul Matusz, and Lottie Wilson, three counts of second degree robbery of the same victims, three counts of second degree aggravated assault on the same victims, and felony murder of Paul Matusz. *Id.* at 800-801. The indictment

trial,[67] the prosecution called twenty-four witnesses, including one of Gerald's accomplices. This accomplice asserted that Gerald knocked Paul Matusz unconscious, continued to beat him, and ordered a third accomplice to leave the console television set on the victim's face.[68] The State introduced evidence that demonstrated that the bruises on the victim's face were consistent with the design on the soles of Gerald's sneakers.[69]

The jury found the defendant guilty of nearly all the crimes with which he was charged, including the purposeful or knowing murder of Paul Matusz.[70] At the sentencing phase, the jury found that the aggravating factors existed beyond a reasonable doubt.[71]

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charged accomplice John Bland with the same offenses. *Id.* at 801. The third accomplice, Edward Walker, a juvenile, was charged with those crimes as well, and jurisdiction was asserted over him by the Superior Court. *Id.*

67 Pursuant to N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982), New Jersey has a bifurcated sentencing system in capital cases. That section reads:

> 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 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.

N.J. STAT. ANN. § 2C:11-3 (West 1982).

68 *Gerald*, 549 A.2d at 802.

69 *Id.*

70 *Id.* Gerald was acquitted on the charge of aggravated assault against John Matusz. *Id.* at 803.

71 *Id.* Pursuant to N.J. STAT. ANN. § 2C:11-3(c)(2)(a) (West 1982), "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." In *Gerald*, the state was seeking to prove aggravating factors (c)(4)(c), ("[t]he murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or

Concluding that the mitigating factors failed to outweigh the aggravating factors, the trial court sentenced Gerald to death.[72]

On appeal, the New Jersey Supreme Court, in an opinion authored by Justice Clifford, held that the trial court's penalty-phase jury charge, which instructed the jury "to determine whether the totality of mitigating factors outweighed or equalled the totality of the aggravating factors beyond a reasonable doubt,"[73] required the death sentence to be vacated pursuant to the holding in *State v. Biegenwald*.[74]

The Supreme Court, however, chose not to vacate the death sentence on those grounds.[75] The court held on state constitutional grounds that a defendant who is convicted of knowingly or purposely causing serious bodily injury resulting in death, compared with a defendant who is convicted of knowingly or purposely causing death, is not eligible for capital punishment.[76] The court futher held that Gerald's death sentence could not stand, since the jury failed to specify whether it had convicted him of knowing or purposeful murder or knowing or purposeful infliction of serious bodily injury resulting in death.[77]

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an aggravated assault to the victim") and (c)(4)(g), ("[t]he offense 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 or kidnapping"). *Gerald*, 549 A.2d at 803.

72 *Gerald*, 549 A.2d at 803-04.

73 *Id.* at 804.

74 State v. Biegenwald, 524 A.2d 130 (N.J. 1987). In *Biegenwald*, the defendant shot his victim, eighteen year-old Anna Olesiewicz, four times in the head after luring her back to his apartment with promises of marijuana. *Id.* at 132-33. At the trial phase, Biegenwald was found guilty of murder and other lesser offenses. *Id.* at 135. At the penalty phase, the jury was not instructed that it must "be convinced beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors . . . ." *Id.* The jury found that neither of the two aggravating factors proffered by the State were outweighed by the combined mitigating factors, and the court sentenced Biegenwald to death. *Id.* at 136. On appeal, the Supreme Court held "that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." *Id.* at 156 (emphasis in original). As such, Biegenwald's sentence of death was reversed and remanded for resentencing. 524 A.2d at 158. The Court held that in all cases tried for capital murder, "the State must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors." *Id.*

75 *Gerald*, 549 A.2d at 807. Instead, the court addressed an issue that had neither been "raised nor argued by the parties, but one that nevertheless demand[ed] consideration because of its importance to a just resolution of [the] appeal." *Id.*

76 *Id.*

77 *Id.* The court noted that "the jury could have determined that the defendant

The court acknowledged that the language of the capital punishment statute "clearly exposes to the death penalty one who purposely or knowingly causes serious bodily injury resulting in death."[78] The court nevertheless held that a failure to distinguish between knowingly or purposely causing death and knowingly or purposely causing serious bodily injury resulting in death undermines the basic premise that the most culpable of mental states ought to be punished most severely.[79] Because a defendant falling within the latter category might not have intended the victim's death, the court held that subjecting such a defendant to the death penalty is violative of Article I, paragraph 12 of the New Jersey Constitution, prohibiting the infliction of cruel and unusual punishment.[80]

To support its holding, the court cited the remarks of Senator John Russo (a Democrat from the 10th District), the chief sponsor of the legislation that reinstated the death penalty in New Jersey, and the Chairman of the Senate Judiciary Committee in 1982.[81] The court noted that Senator Russo, speaking at a public hearing addressing the reinstatement of capital punishment, stated that a defendant is subject to death penalty proceedings "only after having been 'found guilty unanimously and beyond a reasonable doubt of *first degree murder, willful, premeditated murder.*'"[82] The court likewise made reference to the Senate Judiciary Committee Statement to S.112 to support its decision.[83]

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had the purpose or knowledge to cause only serious bodily injury but not death, . . . and that the judgment of conviction must [therefore] be reversed and the cause remanded for retrial." *Id.*

78 *Id.* at 808 (citing State v. Ramseur, 524 A.2d 188 (N.J. 1987)(Handler, J., dissenting)).

79 State v. Gerald, 549 A.2d 792, 801 (N.J. 1988).

80 *Id.* at 818. Prior to the Constitutional Amendment to be discussed, *infra* notes 118 to 154 and accompanying text, Article I, paragraph 12 of the New Jersey Constitution read: "Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted." N.J CONST. art. I, § 12.

81 549 A.2d at 818.

82 *Id.* (emphasis in original).

83 *Id.* The text of the Senate Judiciary Committee Statement to Senate Bill No. 112, which reintroduced capital punishment in New Jersey, stated that "only a person who actually commits an intentional murder, the perpetrator, and a person convicted as an accomplice who hired the perpetrator, the procurer, would stand in jeopardy of the death penalty." *N.J. Senate Judiciary Comm., Statement to S. 112*, 200th Leg., 1st Sess. 1 (Mar. 1, 1982). The Statement further read that "[p]ersons convicted under the felony-murder doctrine and persons convicted as accomplices other than as procurers

The court additionally looked to § 2A:113-2, the New Jersey murder statute in effect prior to the 1978 adoption of the Code of Criminal Justice,[84] in an attempt to support its position.[85] First degree murder, the only classification of murder that merited capital punishment under the old statute,[86] required proof of premeditation, such as evidence of poison or lying in wait.[87] The defendant's mental state, the court held, was of equal significance in analyzing the current death penalty statute as it was in analyzing the prior statute.[88] Since only knowing or purposeful murderers were death-eligible under § 2A:113-2, the court reasoned that these same individuals *alone* should be subject to capital sentencing procedures under the current statute.[89] This analysis, the court held, subjected the statute to a "narrowing construction that would free it from constitutional defect, a construction that comports with the Legislature's stated intent in originally adopting the act."[90]

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would not be eligible for capital punishment." *Id.* Nowhere in the Statement to S.112 is serious bodily injury murder mentioned.

84 549 A.2d at 808, 818.

85 *Id.* at 808, 818.

86 *Id.* N.J. STAT. § 2A:113-4 (West 1985) stated:

> Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

N.J. STAT. § 2A:113-4, *repealed by* New Jersey Code of Criminal Justice, L. 1978, ch. 95, § 2C:98-2, eff. Sept. 1, 1979.

87 549 A.2d at 808. N.J. STAT. § 2A:113-2 (West 1985) stated:

> Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree.

N.J. STAT. § 2A:113-2, *repealed by* New Jersey Code of Criminal Justice, L. 1978, ch. 95, § 2C:98-2, eff. Sept. 1, 1979.

88 549 A.2d at 818.

89 *Id.*

90 *Id.* The court compared serious bodily injury murder with aggravated assault, and unequivocally stated that "the purposeful or knowing infliction 'of serious bodily injury resulting in death,' . . . is an aggravated assault from which death results." *Id.* at 816. The court referred to N.J. STAT. ANN. § 2C:12-1(b)(1) (West 1982), which states that a defendant is guilty of an aggravated assault if that defendant "[a]ttempts to cause serious bodily injury to another, or causes such injury purposely or knowingly,

Since the jury instruction in Walter Gerald's case may have permitted the jury to convict him of either purposely or knowingly causing death *or* purposely or knowingly causing serious bodily injury resulting in death, the court refused to sustain the defendant's capital sentence.[91] As such, the court ordered that the guilt phase of the capital murder charge be retried.[92]

The *Gerald* decision has allowed the New Jersey Supreme Court to vacate death sentence after death sentence. In *State v. Davis*,[93] for example, the defendant strangled his victim to death with an electric cord, and then proceeded to stab and mutilate her body with a screwdriver and a knife.[94] The defendant pled guilty to a charge of purposely or knowingly causing the death or serious bodily injury resulting in the death of his victim.[95] The penalty-

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or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury . . . ." N.J. STAT. ANN. § 2C:12-1(b)(1) (West 1982).

The only difference between serious bodily injury murder and aggravated assault, the court held, is that in the former situation the victim has died, while in the latter case the victim has survived. 549 A.2d at 816. Because aggravated assault is not a capital crime, but one which carries a prison sentence, and "[b]ecause the actor's conduct, mental state, and intended result in both instances are virtually identical, the victim's fortuitous survival in one case and unfortunate demise in the other cannot provide an adequate basis for subjecting one actor to a term of imprisonment and executing the other." *Id.* This analysis, taken in conjunction with the Senate Judiciary Committee Statement to S.112, discussed *supra*, note 83, and an examination of the prior death penalty statute, discussed *supra*, notes 86-87, prompted the court to conclude that the Legislature never intended to subject serious bodily injury murderers to capital sentencing. 549 A.2d at 808-18.

91 549 A.2d at 819.

92 *Id.*

93 561 A.2d 1082 (N.J. 1989).

94 *Id.* at 1085. The defendant knew his victim, Barbara Blomberg, on a personal level. She had been introduced to Davis through a mutual friend, and their relationship was such that Davis described her as being "'like a sister.'" *Id.* at 1084. On the night of the murder, Davis went to Blomberg's home and jimmied the door open with a screwdriver. *Id.* at 1085. He offered no explanation as to why he appeared at Blomberg's home or why he killed her, other than asserting that he had been drinking heavily and using drugs that day and night. *Id.* at 1084-85. When he testified on his own behalf, Davis described the killing as "senseless" and "weird," "'like somebody else'. . . was doing it." *Id.* at 1085. The defense attempted to show that Davis' ability to exercise normal behavior was adversely affected by his alcohol and drug consumption. *Id.* at 1086. The State countered this with expert testimony, arguing that Davis exhibited "'goal-seeking'" activity. *Id.* This was evidenced by Davis' own testimony indicating that he consciously searched Blomberg's kitchen for an electrical cord, and placed it around his neck as he walked up the steps to Blomberg's bedroom. *Id. See also id.* at 1120 (Garibaldi, J., dissenting) (stating, "I find that the evidence overwhelmingly demonstrates that defendant killed deliberately.")

95 *Id.* at 1096. A defendant may waive the right to the guilt phase of a capital

phase jury concluded that the aggravating factors proved by the State outweighed the mitigating factors proffered by the defense, and Davis was sentenced to death.[96] Asserting that Davis pled guilty to a single charge of two alternative forms of murder, one eligible for the death penalty and the other ineligible,[97] the Supreme Court held that the plea failed to distinguish between the two forms of murder as required under *Gerald*, and was therefore not death-eligible.[98]

The case of *State v. Jackson*[99] is procedurally similar to *Davis*, in that it also involved a defective plea. Jackson entered his female neighbor's home and stabbed her fifty-three times, mutilating and killing her.[100] He was indicted for knowing or purposeful murder,

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proceeding pursuant to N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982): "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." *Id.*

96 *Davis*, 561 A.2d at 1086. The New Jersey Supreme Court could have vacated the death sentence on the grounds that the judge failed to instruct the jurors, pursuant to State v. Biegenwald, 524 A.2d 130 (N.J. 1988), that it must find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before a sentence of death could be imposed. 561 A.2d at 1100.

97 561 A.2d at 1098.

98 *Id.* at 1099. The court was troubled by the fact that the defendant's plea transcript, while supplying a factual basis for a knowing or purposeful murder, likewise included statements which indicated that Davis did not "'go in[to] that apartment with the idea or intention to kill [Blomberg]. . . .'" *Id.* at 1096-97. Davis essentially pled guilty to both capital and non-capital murder at the same time, and was sentenced to death without ever having been "informed of the level of intent required to establish death eligibility." *Id.* at 1099. While the evidence clearly suggested a knowing or purposeful killing, Davis' statements contradicted such a finding. *Id.* at 1097. The plea was therefore held defective by the court, and the case was remanded for proceedings in conformity with *Gerald*. *Davis*, 561 A.2d at 1100. Justice Garibaldi dissented, stating that Davis' confession provided strong evidence of his intent to kill. *Id.* at 1120. (Garibaldi, J., dissenting). Defendant's statement, that he had not gone to Blomberg's apartment with the intent to kill her, did not preclude him from formulating the intent once he was there. *Id.* at 1121. The fact that defendant searched for his weapon upon entrance, placed the electrical cord around his neck with "premeditated calm," and ascended the stairs to his victim's bedroom, only to violently mutilate her body with a knife and screwdriver and strangle her for several minutes, was overwhelming evidence of a knowing or purposeful murder. *Id.* Justice Garibaldi held that a failure to instruct the jury on the basis of *Gerald* was, therefore, harmless error. *Id.* at 1121.

99 572 A.2d 607 (N.J. 1990).

100 *Id.* at 608. The State claimed that the defendant stabbed the victim "'wildly, viciously, repeatedly: 53 times,'" eighteen times in the genital area alone. There was also evidence of an attempted rape. Following the murder, Jackson stole his victim's

in violation of N.J. STAT. ANN. § 2C:11-3(a)(1) and (2), to which he pled guilty.[101] The penalty-phase jury found that the aggravating factors existed and outweighed the mitigating factors beyond a reasonable doubt; hence, Jackson was sentenced to death.[102] In a *per curiam* opinion, the Supreme Court held that the defendant's plea "embrac[ed] both capital and non-capital murder" in violation of *Gerald*, and vacated the death sentence.[103]

Similarly, in *State v. Pennington*,[104] the defendant shot his victim in the heart at close range, killing her instantly.[105] He was charged with knowing or purposeful murder, found guilty of the offense, and sentenced to death at the penalty phase.[106] In an opinion written by Justice Pollock, the Supreme Court stated that an "[o]mission of a *Gerald* charge is reversible error if the evidence is 'minimally adequate' to provide a rational basis for the jury to find that defendant intended to cause serious bodily injury."[107] Holding that Pennington "cleared this 'low threshold'"[108] by intro-

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car, and drove around while drinking beer and looking for marijuana. Arrested two days later, Jackson confessed to the murder. *Id.*

101 *Id.*

102 *Id.*

103 *Id.* The court held that the indictment, which charged the defendant with a violation of N.J. STAT. ANN. § 2C:11-3(a)(1), (2) (West 1982), embraced both capital and non-capital murder. 572 A.2d at 608. Noting that the defendant never acknowledged that he intended the victim's death, the court held that "there [was] not an adequate factual basis for the intentional killing that is the predicate to death eligibility." *Id.* at 610. The court further stated that "[a]ll that the trial court had were the ambiguous statements made by the defendant at the plea hearing, none of which was sufficient to establish the state of mind necessary for capital murder under *State v. Gerald*." Id.

104 575 A.2d 816 (N.J. 1990).

105 *Id.* at 820. The killing took place late at night at a neighborhood bar. *Id.* Pennington testified that after the other patrons had left, he pulled out a gun and attempted to rob the bar, claiming that he had no intention of hurting anyone. *Id.* at 820-21. Defendant further testified that the victim threw a glass at him, causing him to react by pulling the trigger and shooting Arlene Connors. *Id.* at 821. The victim's daughter, Pam, related two stories, one similar to that offered by defendant and another indicating a knowing or purposeful murder. *Id.* at 820.

106 *Id.*

107 *Id.* at 822 (citing State v. Pitts, 562 A.2d 1320 (N.J. 1989)).

108 575 A.2d at 822 (citing State v. Crisantos (Arriagas), 508 A.2d 167 (N.J. 1986)). This "low threshold" analysis is really nothing more than a rational basis test. State v. Crisantos, (Arriagas), 508 A.2d 167, 174 (N.J. 1986). In *Crisantos*, the court held that where a defendant requests a lesser-included offense charge, the trial judge must examine the record to determine if there is a rational basis for instructing the jury in that manner. *Id.* The court made reference to N.J. STAT. ANN. § 2C:1-8(e) (West 1982), which states that "[t]he court shall not charge the jury with respect to an in-

ducing evidence[109] that merited a *Gerald* charge,[110] the court reversed the defendant's capital murder conviction.[111]

In *State v. Harvey*,[112] the defendant burglarized his victim's apartment, and struck her with a hammer-like object at least fifteen times when she challenged him.[113] Harvey was convicted of knowing and purposeful murder and, following penalty-phase proceedings, was sentenced to death.[114] As in *Pennington*, the New Jersey Supreme Court held that "a rational jury could have concluded

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cluded offense unless there is a rational basis for a verdict convicting the defendant of the included offense." 508 A.2d at 172. This rational basis test, the court held, "imposes a low threshold" for determining whether to instruct the jury on the lesser-included offense. *Id.* at 174.

109 *Pennington*, 575 A.2d at 822. While the State asserted that the defendant's firing of a single shot, which hit Arlene Connors in the heart, was proof of an intent to kill, the Supreme Court held that there existed evidence to the contrary, which necessitated a charge on serious bodily injury. *Id.* at 823. The court stated: "[T]he fact that the defendant fired a single shot that hit the victim's heart does not necessarily prove that defendant intended to kill." *Id.* Statements made by the defendant's wife, who testified that her husband informed her immediately after the shooting that he had "'just shot a woman,'" and "'didn't mean to do it,'" and by a Sergeant from the Prosecutor's Office, who testified that Pennington believed that the shot had hit Connors in the shoulder, were indicative of an intent to commit serious bodily injury, according to the court. *Id.* The court likewise pointed to the trial court's instruction on aggravated and reckless manslaughter to support its finding that there existed sufficient evidence of a lack of deliberation on Pennington's part to merit a *Gerald* charge. *Id.* The court went on to assert that "[t]he question is not whether a finding of intent to cause serious bodily injury is likely, but whether the evidence provides a rational basis for such a finding." *Id.*

110 *Pennington*, 575 A.2d at 823. Defendant was convicted of knowing or purposeful murder in violation of N.J. STAT. ANN. § 2C:11-3(a)(1), (2) (West 1982), which encompasses both intent to kill and intent to cause serious bodily injury. *Id.* at 822. The judge failed to instruct the jury to distinguish between the two offenses, the former being eligible for the death penalty and the latter being ineligible. Without that distinction, the court had no choice but to vacate the capital murder conviction. *Id.*

111 *Id.* at 844. This reversal came despite the vehement dissent of Justice Stein, who stated that "[n]o evidence on [the] record, . . . suggest[ed] that the defendant's 'conscious object' was to cause only serious bodily injury, but not death, to Mrs. Connors, or that defendant was 'practically certain' that only serious bodily injury, but not death, would result from the shooting." *Id.* at 853-54 (Stein, J., dissenting). The Justice agreed with the State's argument that shooting the victim at close range near the heart could not "conceivably be understood to reflect an intent only to injure." *Id.* at 854.

112 581 A.2d 483 (N.J. 1990).

113 *Id.* at 485. This figure came from the medical examiner, who claimed that the victim, Irene Schnaps, had suffered skull fractures, a broken jaw, and a deep skull laceration. *Id.* The doctor believed she had been hit at least fifteen times with a blunt object. *Id.*

114 *Id.*

that defendant inflicted the fatal blows, but had not intended to kill."[115] Because the trial court failed to instruct the jury to distinguish between serious bodily injury murder and knowing or purposeful murder, the court vacated Harvey's death sentence.[116]

It is obvious that the *Gerald* decision has had a monumental impact upon numerous death penalty decisions.[117] The introduction of the following bills indicate the tremendous dissatisfaction which pervaded throughout the halls of the State Capitol over this fact.

V. The Amendment to the Constitution

Assemblymen Haytaian (R-Warren), Stuhltrager (R-Salem, Cumberland, Gloucester), and Collins (R-Salem, Cumberland, Gloucester) introduced Assembly Concurrent Resolution 20 (hereinafter "ACR.20") to the General Assembly on February 13, 1992.[118] ACR.20 was drafted to amend Article I, paragraph 12 of the New Jersey State Constitution to provide that the death penalty would not be cruel and unusual punishment when imposed upon a

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115 *Id.* at 486. The State argued that there was no rational basis for a jury charge on serious bodily injury murder, pointing to the medical evidence which indicated overwhelmingly an intent to kill. *Id.* The court looked to the defendant's confession, in which he admitted to striking Schnaps only once after she first hit him in the nose, and held that this suggested that Harvey may have only intended to injure his victim. *Id.* Additionally, the court noted that "the defendant's initial intent was to commit burglary, not murder." *Id.* Hence, a jury charge on serious bodily injury murder was necessary. *Id.*

116 *Id.* The court stated that "[t]he record provided 'a rational basis for the jury to find that the defendant intended to cause only serious bodily injury.'" *Id.*

117 This monumental impact is readily demonstrated by the fact that several death sentences were reversed on the basis of *Gerald*, for failure to differentiate between knowing or purposeful murder and knowing or purposeful infliction of grievous bodily injury resulting in death. *See supra* notes 93-116 and accompanying text. *See also* State v. Erazo, 594 A.2d 232 (N.J. 1991) (death sentence for stabbing and killing wife reversed for failure to instruct jury on serious bodily injury murder; jury may have concluded on evidence that defendant intended less than death of victim); State v. Clausell, 580 A.2d 221 (N.J. 1990) (death sentence for contract killing of victim reversed due to absence of a *Gerald*-type charge, since jury may have concluded on evidence that intent was only to injure); State v. Long, 575 A.2d 435 (N.J. 1990) (death sentence for shooting liquor store manager in chest at close range reversed in absence of *Gerald* charge; jury may have rationally concluded that defendant only intended serious bodily injury); State v. Coyle, 574 A.2d 951 (N.J. 1990) (death sentence for shooting victim in back of head at close range reversed, since jury may have concluded, upon considering evidence, that defendant intended only to seriously injure; thus, *Gerald*-type instruction was necessary).

118 A. Con. Res. 20, 205th Leg., 1st Sess. (1992) (enacted) [hereinafter ACR.20].

defendant convicted of purposely or knowingly causing death, or a person convicted of purposely or knowingly causing serious bodily injury resulting in death.[119] Section two of ACR.20 provided that once the proposed amendment was finally agreed upon,[120] it would be submitted to the people at the next general election.[121]

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119 *Id.* The actual text of the amendment read as follows:

> Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. *It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death 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.*

Id. (emphasis supplied).

120 *Id.* Article IX, para. 1 of the New Jersey Constitution states that an amendment to the Constitution may be proposed in either the Senate or General Assembly. N.J. CONST. art. IX, § 1. Prior to the members of either house voting on the matter, a public hearing must be held. *Id.* If the proposed amendment is agreed upon by three-fifths of the members of each house, it shall be submitted to the people for their vote. *Id.*

121 ACR.20, *supra* note 118. Section 2 further read that the proposed amendment would be published at least once in at least one newspaper in every county. The actual text of the referendum read as follows:

> PROVIDING IT IS NOT CRUEL AND UNUSUAL PUNISHMENT TO IMPOSE THE DEATH PENALTY ON PERSONS WHO PURPOSELY OR KNOWINGLY CAUSE DEATH OR PURPOSELY OR KNOWINGLY CAUSE SERIOUS BODILY INJURY RESULTING IN DEATH.
>
> Shall the amendment to Article I, paragraph 12 of the Constitution providing that it is not cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death 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 be approved?
>
> INTERPRETIVE STATEMENT
>
> This constitutional amendment would provide that it is not cruel and unusual punishment under our State Constitution to impose the death penalty on a person who is convicted of purposely or knowingly causing death or purosely or knowingly causing serious bodily injury resulting in death if that defendant committed the act himself or paid for another to commit the act.

Id. (emphasis in original).

A referendum is defined as

> [t]he process of referring to the electorate for approval a proposed new state constitution or amendment (constitutional referendum) or of a law passed by the legislature (statutory referendum). Right constitutionally reserved to people of state, . . . to have submitted for their approval or rejection, under prescribed conditions, any law or part of law passed by lawmaking body.

The Assembly Statement to ACR.20 acknowledged that the New Jersey death penalty scheme was "called into question by the New Jersey Supreme Court in the decision of *State v. Gerald* . . . , in which the court differentiated between 'causing death' and 'causing serious bodily injury resulting in death.'"[122] The Statement unequivocally asserted that the amendment was intended to invalidate the *Gerald* decision.[123]

The bill was referred to the Assembly Judiciary, Law and Public Safety Committee on February 13, 1992 for consideration.[124] On February 27, 1992, the Committee acted favorably on ACR.20 and moved to release the bill unamended by a vote of 6-2.[125] On March 16, 1992, the Assembly Judiciary, Law and Public Safety Committee held a public hearing on ACR.20. At this hearing, Committee Chairman Gary M. Stuhltrager, a co-sponsor of the bill, officially stated that the proposed constitutional amendment embodied in ACR.20 was the result of the New Jersey Supreme Court's opinion in *State v. Gerald.*[126] The purpose behind the bill, he ex-

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BLACK'S LAW DICTIONARY 1281 (6th ed. 1991).

122 N.J. ASSEMBLY, STATEMENT to ACR.20, 205th Leg., 1st Sess. (1992).

123 *Id.* The langauge of the Statement is crystal clear:

> This proposed constitutional amendment is intended to overturn [the] portion of the Court's decision in the *Gerald* case [holding that a defendant who is convicted of purposely or knowingly causing 'serious bodily injury resulting in death'. . . may not be subjected to the death penalty,] and establish that it is not violative of the State Constitution to make these defendants eligible for the death penalty sentencing process.

Id.

124 Telephone Interview with New Jersey Office of Legislative Services (Aug. 30, 1993) [hereinafter Interview with N.J. OLS].

125 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 1 (vote tally sheet of the members of the Assembly Judiciary, Law and Public Safety Committee). The only Assemblymen on the committee who chose not to vote favorably on the bill were Assemblyman Byron M. Baer (D-Bergen), and Assemblyman Robert L. Brown (D-Essex). *Id.* At the public hearing held on ACR.20, Assemblyman Baer expressed his position that amending the Constitution was unnecessary, since all the death sentences reversed on the basis of *Gerald* were imposed prior to that ruling. *Id.* at 9. Prosecutors and judges since the *Gerald* decision understand the necessity of proving that a given defendant knowingly or purposely caused the death of another before the death penalty may be imposed. *Id.* Assemblyman Baer, therefore, expressed his concern that amending the Constitution in this instance not only seeks to address a problem which no longer exists, but subjects to the death penalty those defendants who do not possess the requisite mental state. *Id.* at 9-12. Assemblyman Brown expressed his general concern that the death penalty is imposed disproportionately against minorities. *Id.* at 30-35.

126 *Id.* at 1.

pressed, was to invalidate this decision.[127]

Though he did not testify at the hearing personally, a statement issued by New Jersey State Attorney General Robert J. Del Tufo in support of ACR.20 was made a part of the record.[128] The Attorney General forcefully asserted his belief that it was the Legislature's intent in 1982, when the death penalty was reinstated, that those who purposely or knowingly cause serious bodily injury resulting in death should be exposed to capital punishment proceedings.[129] By effectively overturning *Gerald*, Del Tufo posited, ACR.20 would "reestablish[ ] that which [the] Legislature and the Executive Branch have always intended regarding the class of individuals eligible for the death penalty."[130]

Attorney General Del Tufo's statement indicated two other bases of support for ACR.20. First was the United States Supreme

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127 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 1. Testifying at the hearing considering ACR.20 was Adelle Bruni of the Woodrow Wilson School of Public and International Affairs at Princeton University. *Id.* at 2-13. Bruni was critical of what she perceived as a "substantive" application of *Gerald* by the New Jersey Supreme Court, rather than a "procedural" application. *Id.* at 3. This approach, she theorized, has been consistently demonstrated by the fact that the court has not only required sufficient evidence to merit a *Gerald* charge reversal, but has, on numerous occasions, "weighed the evidence as if [it were] a jury." *Id.* Despite her criticism, however, Bruni testified that she supported the *Gerald* ruling, arguing that the more culpable a defendant's state of mind, the more severe the punishment should be. *Id.* at 3-4. Not surprisingly, Bruni recommended non-passage of ACR.20. *Id.* at 4. In addition to the testimony of Adelle Bruni, the Committee heard comments from Leigh Bienan, Esq., Director of the Woodrow Wilson School. *Id.* at 15-19. Ms. Bienan expressed her sentiment that capital punishment is both costly and time consuming, and maintained that "an enormous amount of resources are spent seeking vengeance for a very small group of victims." *Id.* at 18. Ms. Bienan likewise emphasized her position that capital punishment taxes an already overburdened court system. *Id.*

128 *Id.* at 1x.

129 *Id.* at 1x-2x. The Attorney General claimed that a reading of the statute supports this intent. *Id.* at 2x. He made reference to the fact that the New Jersey Supreme Court, in *Gerald*, acknowledged that the language of the statute clearly exposed serious bodily injury murderers to capital punishment. *Id.* The court in *Gerald* explicitly stated:

> *As the statute is written*, all defendants convicted of purposeful or knowing murder under N.J.S.A. 2C:11-3(a)(1) and (2) are exposed to the death penalty, under N.J.S.A. 2C:11-3(c), provided that they either committed the homicidal act by their own conduct or hired another to commit that act. All such defendants, including those who did not intend the death of their victim, face the death penalty as a potential punishment.

549 A.2d at 815 (emphasis added).

130 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 2x.

Court decision in *Tison v. Arizona*,[131] which essentially held that the death penalty may be inflicted upon one who causes death, without the purpose or knowledge that death will actually result.[132] ACR.20, according to Del Tufo, would comport with the United States Supreme Court's holding[133] by eradicating that trivial distinction between purposely or knowingly causing death and purposely or knowingly causing serious bodily injury resulting in death.[134]

Del Tufo's second basis of support for ACR.20 came from what he referred to as the court's "casual dismissal" of the intent issue raised in *Gerald*, "upon first considering the death penalty law in *State v. Ramseur*."[135] Over Justice Handler's dissent, Del Tufo

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131 481 U.S. 137 (1987). In *Tison*, defendants were sentenced to death for felony-murder and accomplice liability, in connection with the execution-style killing of a family commited by the defendants' father and another accomplice. *Id.* at 139-42. Because the Tison brothers were actively and substantially involved in every aspect of the criminal activity, and because their conduct exhibited a "reckless indifference to human life," the Supreme Court upheld their death sentences, despite no proffered proof of an intent to kill. *Id.* at 158.

132 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 3x. The *Gerald* court addressed the *Tison* decision, and made the following statement: "The [United States] Supreme Court . . . has observed that in capital cases, as in other constitutional contexts, the states 'are free to provide greater protections in their criminal justice system than the Federal Constitution requires.'" 549 A.2d at 810 (citing California v. Ramos, 463 U.S. 992, 1013-14 (1983)). Adhering to this basic principle, the court went on to state that "the Tison brothers—who were convicted of felony-murder and accomplice liability theories . . .—could not have been subjected to capital punishment had they been tried and convicted under New Jersey law." *Id.* at 811.

133 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 4x.

134 *Id.* at 3x. The Attorney General quoted the *Tison* Court, which held:

> A narrow focus on the question of whether . . . a given defendant 'intended to kill,' . . . is a highly unsatisfactory means of definitely distinguishing the most culpable and dangerous of murderers . . . . [S]ome nonintentional murders may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' . . . [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment, when that conduct causes its natural, though not inevitable, lethal result.

Id. at 4x (quoting Tison v. Arizona, 481 U.S. 137 (1987)).

135 *Id.* at 5x. In his dissenting opinion in State v. Ramseur, 524 A.2d 188 (N.J.

noted, the majority found that the distinction between intent to cause serious bodily injury and intent to kill was an "irrelevant" issue, and went on to uphold the constitutionality of the death penalty law.[136] Del Tufo further added that the *Gerald* decision has interfered with the operation of New Jersey's death penalty law, and that ACR.20 would effectively eradicate this problem.[137]

ACR.20 passed the full Assembly on April 30, 1992 by an overwhelming majority of 61-2.[138] On May 4, 1992, Senator Joseph Bubba (R-Passaic) introduced Senate Concurrent Resolution No. 48 (hereinafter "SCR.48") to the New Jersey Senate, a bill identical in form and substance to its Assembly counterpart, ACR.20.[139] On that same day, the Senate Judiciary Committee acted favorably on SCR.48, moving to release the bill unamended by a vote of 6-1, with

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1987), Justice Handler stated that the current death penalty statute exposes a wider class of defendants to capital sentencing procedures than did its predecessor (in effect until 1972, when it was pronounced unconstitutional). *Id.* at 323. (Handler, J., dissenting). *See also supra* notes 32, 86-87. This is so, he opined, because the language of the current statute exposes to the death penalty not only those who knowingly or purposely kill, but those who intend only serious bodily injury where death results. *Ramseur*, 524 A.2d at 323. Handler noted that the majority acknowledged this fact, "but insist[ed] that '[t]he comparison . . . is irrelevant' because there is no requirement that that the class at the guilt phase 'be smaller than the class ultimately subject to the death penalty under a state's prior statute.'" *Id.*

136 *Assembly Comm. Hearing on ACR.20, supra* note 55, at 5x.

137 *Id.* at 6x. Del Tufo stated that "under the statute as enacted by this Legislature [in 1982], an individual who, by his own hand, or through the hiring of another, purposely or knowingly causes serious bodily injury which results in . . . death . . . would be eligible for capital punishment." *Id.* at 2x. The relevent sections of the statute upon which the Attorney General based his argument reads as follows:

> a. Except as provided in section 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 . . . .
>
> c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct . . . 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 . . . .

N.J. STAT. ANN § 2C:11-3 (West 1982).

Ironically, the New Jersey Supreme Court was in obvious agreement with Del Tufo's position when it drafted the *Gerald* decision, noting that the language of the statute, as written, clearly exposes serious bodily injury murderers to capital sentencing. *See supra* note 129.

138 Interview with N.J. OLS, *supra* note 124.

139 S. Con. Res. 48, 205th Leg., 1st Sess. (1992) (enacted) [hereinafter SCR.48].

one abstention and one legislator not present for the vote.[140]

The Senate Judiciary Committee held its public hearing on SCR.48 on May 26, 1992.[141] At this hearing, former Senate President John F. Russo, the sponsor of the 1982 bill that reinstated capital punishment in New Jersey, expressed his opposition to ACR. 20 and SCR.48.[142] Russo proclaimed that it was always his understanding, as sponsor of the 1982 Act, that the death penalty would "be applied in only those unusually savage and severe murder cases where the defendant intended the death of his victim."[143] Senator Russo therefore recommended that the Legistature exercise restraint rather than "overreact" to unpopular Supreme Court decisions.[144] In addition to Russo's testimony, numerous others testified in opposition to the passage of ACR.20/SCR.48.[145]

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140 *Public Hearing on SCR.48, Before the Senate Judiciary Committee*, 205th Leg., 1st Sess. (1992) (vote tally sheet of the members of the Senate Judiciary Committee) [hereinafter *Public Hearing on SCR.48*]. The abstention was Senator John O. Bennett (R-Monmouth). *Id.* While Bennett does not personally believe in capital punishment, he abstained from the vote because the majority of his constituents do believe in it. Telephone Interview with Donna Phelps, Legislative Aide to Senator John O. Bennett (Sept. 1, 1993). The unfavorable vote came from Senator Edward T. O'Connor, Jr., (D-Hudson), *id.*, who opposes the death penalty generally. Senator O'Connor will vote against *any* death penalty legislation introduced. Telephone Interview with Joe Guarino, Legislative Aide to Senator Edward T. O'Connor, Jr. (Sept. 23, 1994).

141 *Public Hearing on SCR.48, supra* note 140.

142 *Id.* at 6-7.

143 *Id.* at 9. Russo asserted that he did not mean to suggest that the defendants in many of these capital cases did not intend the deaths of their victims, but only that the jurors must be properly instructed that they need to find that the defendant knowingly or purposely caused death before the death sentence may be imposed. *Id.*

144 *Id.* at 7. Sen. Russo stated that

> the one thing that will erode the death penalty in this state, is if we ever get to the point where either we have wholesale executions under circumstances that the public does not support, or if we ever make a mistake . . . . If we ever execute someone who it is later determined not to have committed the murder, that single event will erode public confidence in the death penalty . . . .

Id. at 8.

145 *See generally, id.* at 20-23, 24-25, 29-34. Each of these individuals expressed their opposition to the death penalty in general, and not simply to the proposed Constitutional Amendment. Jean Barret of the American Civil Liberties Union argued that the death penalty is imposed disproportionately against minorities and the poor, and serves no legitimate social purpose. *Id.* at 21. Ms. Barret based her opposition to the proposed amendment on these grounds, as well as her belief that more faith and creedence should be placed in the abilities of jurors to make the "right calls" regarding a defendant's culpability. *Id.* at 23. Karen Spinner, the Director of Public Education and Policy for the New Jersey Association on Correction, asserted that capital punishment "only dehumanizes and degrades the entire society, and permits us to

Despite Senator Russo's caustic opposition, numerous supporters of SCR.48 testified at the hearing. William Lamb, First Assistant Prosecutor of Middlesex County, appeared on behalf of the County Prosecutor's Association of New Jersey in support of SCR.48 and ACR.20.[146] Lamb criticized the court for its *Gerald* decision,[147] proclaiming it "unsupportable in logic or in morality."[148] He lambasted the court for its failure to apply the *Gerald* principle uniformly in cases appealed on *Gerald* grounds.[149] A review of the

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divert our attention away from important issues of criminal justice reform." *Id.* at 24-25. Reverend Charles Rawlings of the New Jersey Council of Churches advocated that the most effective means of dealing with the rise of violent crime in society is through educating, training, and rehabilitating the violent offenders. *Id.* at 29-30. Carol Kasabach of the Lutheran Office of Governmental Ministry expressed her opposition to the death penalty for its random and discriminatory application, as well as its "wasteful use of resources." *Id.* at 31-32.

146 *Id.* at 13. Though he did not appear physically at the public hearing conducted on March 16, 1992 by the Assembly Judiciary, Law and Public Safety Committee, First Assistant Prosecutor Lamb issued a strong statement vehemently supporting the passage of ACR.20, which was made a part of the record. *See Assembly Comm. Hearing on ACR.20, supra* note 55, at 7x. In his statement, Mr. Lamb expressed the position of the County Prosecutor's Association that "the *Gerald* decision represents an absurd, never intended construction of our death penalty murder law." *Id.* at 13x. He further posited that "the *Gerald* decision has demoralized prosecutors, bewildered the public, [and] traumatized murder victim families . . . ." *Id.*

147 *Public Hearing on SCR.48, supra* note 140, at 14. Lamb stated:

> It is interesting to me, as a person who litigates capital cases, that this argument was never made in *Ramseur* or any of the subsequent death penalty cases by anyone, including the rather talented and well-funded Public Defender Death Penalty Task Force, nor did anyone ever argue the point in the *Gerald* case itself. This argument was constructed exclusively by the Supreme Court.

Id.

148 *Id.* Lamb gave the following analogy:

> If I were to kidnap a Senator and demand ransom, and if the ransom were not paid, to deliberatively murder the Senator I would be committing a death eligible murder. On the other hand, if I kidnapped a Senator and demanded ransom, and when my ransom demands were not answered I began to slowly dismember the Senator by first cutting off his ear, and next by cutting off his nose, and next by cutting off an arm, not intending to kill the Senator, but to impress upon his friends in the Senate the seriousness of my demands . . . and the Senator goes into shock and dies, that case, under *Gerald*, would not be death penalty eligible, because my intent was not to kill the Senator . . . . I would suggest to you that that result is morally absurd and legally preposterous.

Id. at 14-15.

149 *Id.* at 15-19. Despite the New Jersey Supreme Court's reversal of numerous death sentences on the basis of *Gerald* (*see supra* notes 54-117, and accompanying text), there have been several cases in which a *Gerald* issue has been raised on appeal,

cases, Lamb expressed, simply does not permit a "rationaliz[ation] [of] the way the Supreme Court has utilized its *Gerald* principle."[150] Lamb stated, unequivocally, that one who intends serious bodily injury, but not death, is no better than one who intends to kill; as such, they should be punished equally.[151]

On June 18, 1992, SCR.48 was substituted by ACR.20.[152] That same day, it passed the full Senate by a vote of 34-3.[153] As planned, the proposed amendment was placed on the general election ballot. On November 3, 1993, the citizens of New Jersey voted 3-1 in favor of amending the Constitution.[154]

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but the court has chosen not to reverse on *Gerald* grounds. This has given many prosecutors, including First Assistant Prosecutor Lamb, the distinct impression that the court applies its *Gerald* principle sporadically: The court will refuse to vacate a death sentence on the basis of *Gerald* in one decision, but then reverse the punishment of death in the next, despite the fact that circumstances surrounding the crimes in both cases were equally gruesome and horrifying.

Cases in which the court has not reversed on *Gerald* grounds (but on some other basis) include State v. McDougald, 577 A.2d 419 (N.J. 1990) (death sentence for brutal murder of victims while sleeping at home not vacated despite failure to instruct jury on serious bodily injury murder, since slaying so violent that jury could not have possibly concluded that defendant intended anything less than death; death sentence reversed, however, for erroneous charge on aggravating factors); State v. Hightower, 577 A.2d 99 (N.J. 1990) (death sentence for shooting convenience store clerk in chest, neck, and head not vacated, despite absence of charge on serious bodily injury murder; death sentence reversed, however, because jury charge required juror unanimity on mitigating factor); State v. Rose, 576 A.2d 235 (N.J. 1990) (death sentence for shooting policeman in stomach at point-blank range, killing him, not reversed despite absence of charge on serious bodily injury murder, since inconceivable that defendant was not practically certain that gunshot would kill victim; earlier reversal of death sentence by this court affirmed for several prejudicial errors at trial); State v. Pitts, 562 A.2d 1320 (N.J. 1989) (death sentence for stabbing former lover 23 times not vacated for trial court's failure to instruct the jury on serious bodily injury murder, since violent nature of assault made it inconceivable for jury to have concluded that defendant intended anything less than death; death sentence reversed, however, for failure to properly instruct jury on balancing of aggravating and mitigating factors).

150 *Public Hearing on SCR.48, supra* note 140, at 16.

151 *Id.* at 20. Also testifying on behalf of SCR.48 and ACR.20 were several pro-victims rights advocates. Those who provided testimony were Bradley Brewster of the New Jersey State PBA, Richard Pompielo, Esq., attorney for the New Jersey Crime Victims Law Center, and James O'Brien, Chairman of the Coalition of Crime Victim's Rights. *Id.* at 24, 25-29, 34-36. These individuals asserted that the New Jersey death penalty law needed strengthening, if for no other reason than to provide some semblance of consolation to the families of the innocent victims, who themselves have become victimized through the murders of loved ones. *Id.*

152 Interview with N.J. OLS, *supra* note 124.

153 *Id.*

154 The statewide vote was 1,835,203 in favor of the amendment, 664,258 against. MANUAL OF THE LEGISLATURE OF NEW JERSEY, 205th Leg., 2d Sess., at 892 (1993).

V. The Amendment to the Homicide Statute

On November 18, 1992, Governor James J. Florio instructed Attorney General Robert Del Tufo to take steps that would "ensure proper implementation of the Constitutional Amendment"[155] approved by the voters two weeks earlier.[156] The Governor requested that his Attorney General determine whether any legislation was necessary to fully implement the new Constitutional Amendment.[157] The Attorney General responded by stating that legislation was not essential, but claimed that clarification of legislative intent with respect to death eligibility of defendants was "advisable . . . to ensure [that] the constitutional decision of the people . . . [would] be given full effect."[158]

On December 17, 1992, Assembly Bill No. 2113 (hereinafter A.2113) was introduced by Assemblymen Mikulak (R-Middlesex), Impreveduto (D-Bergen, Hudson), and Lustbader (R-Essex, Union),[159] and was designed to ensure that the Constitutional

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155 Press Release from the Office of Governor Florio, Governor Florio Directs Attorney General to Review Implementation of Constitutional Change to Death Penalty, (Nov. 18, 1992) (on file with *Seton Hall Legislative Journal*) [hereinafter *Florio Release*].

156 *Id.* The Governor stated that New Jersey would finally have a death penalty law "with teeth," and not one that exists "only on paper." *Id.* Florio asserted that the amendment would eliminate those technicalities which have allowed the most violent of murderers to escape the death sentence. *Id.* The Constitutional Amendment, he stated, reflects the view of the people of New Jersey - that those who commit heinous and atrocious killings ought to be subject to the most severe of punishments. *Id.*

157 *See* Letter from Governor Jim Florio to Robert J. Del Tufo, New Jersey Attorney General (Nov. 18, 1992) (letter on file with *Seton Hall Legislative Journal*). The following was sent by the Governor to the Attorney General:

> The voters of this State recently approved by a wide margin an amendment to the State Constitution concerning the death penalty. As you know, this amendment enjoyed widespread support among law enforcement officials, who share our view that we need to take whatever action we can—constitutional, legislative, or administrative—to see that the death penalty law works.
>
> In this spirit, I would like you to immediately review the recently enacted amendment to determine how we can best ensure that on December 3rd, when the amendment takes effect, prosecutors are fully prepared to begin to handle cases in accord with the constitutional amendment. Your review should include a determination of whether any further legislative or administrative action is needed to make the constitutional amendment operative.

Id.

158 Ron Marsico, *Committee Clears Bill Defining Death Penalty*, STAR LEDGER (Newark), Jan. 7, 1993, at 30.

159 A.2113, 205th Leg., 2nd Sess. (1993) (codified as amended at N.J. STAT. ANN.

Amendment would be fully implemented.[160] The bill was likewise drafted to clarify legislative intent regarding homicides eligible for the death penalty, which was called into question in the *Gerald* decision.[161] The bill would amend New Jersey's death penalty statute to state that the term "'homicidal act' means conduct that causes 'death or serious bodily injury resulting in death.'"[162]

On January 6, 1993, the Assembly Judiciary, Law and Public Safety Committee reported favorably upon A.2113.[163] On February 1, 1993 it passed the full Assembly by a vote of 65-0.[164] On Febru-

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§ 2C:11-3(i) (West Supp. 1994)). Assemblyman Steven Mikulak became the chief sponsor of the bill when he heard that the Attorney General's Office had worked on a draft with the Republican Legislative leaders. David M. Levitt, *Death-Penalty Bill Makes Intent Moot*, NEWS TRIBUNE, Dec. 22, 1992, at A-3. Assembly Speaker Garabed "Chuck" Haytaian allowed Mikulak to sponsor the bill after he had expressed an interest in being its prime mover. *Id.*

160 N.J. ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMM., STATEMENT to A.2113, 205th Leg., 2d Sess. (Jan. 6, 1993) [hereinafter ASSEMBLY JUDICIARY STATEMENT]. The Statement relates that in order to clarify legislative intent, and officially eliminate any room for further judicial interpretation "that might narrow the scope of the law to comport with the court's view . . . ," the bill is meant to amend the State death penalty law "to clearly state that the term 'homicidal act' means conduct that causes 'death or serious bodily injury resulting in death.'" *Id.*

161 *Id.* The legislative "intent," at least according to the current members of the New Jersey General Assembly and Senate, is that the infliction of serious bodily injury which results in death ought to be punished through capital sentencing procedures. *Id. See also* A.2113, 205th Leg., 2nd Sess. (1992)(codified as amended at N.J. STAT. ANN. § 2C:11-3(i) (West Supp. 1994)).

162 *Id.*

163 ASSEMBLY JUDICIARY STATEMENT, *supra* note 160. During the committee hearing, Assemblyman Byron Baer (D - Bergen,) expressed his concern that the language of the bill might impose the death sentence upon a defendant even if his victim "happened to die from an injury not generally considered to be life-threatening." Marsico, *supra* note 158, at 30. Assemblyman Mikulak, chief sponsor of A.2113, stated that the people of New Jersey voted in favor of amending the State Constitution out of frustration with the New Jersey Supreme Court's overturning of more than thirty death sentences since the 1982 reinstatement of capital punishment. Levitt, *supra* note 159, at A-3. Mikulak suggested that A.2113 eliminates that "tissue-thin" distinction between intentional murder and intentional infliction of serious bodily injury resulting in death. Assemblyman Steven Mikulak, Remarks at the N.J. Assembly Judiciary, Law and Public Safety Committee Hearing on A.2113 (Jan. 6, 1993) (transcript on file with the *Seton Hall Legislative Journal*). This, he argued, "restore[s] the integrity of New Jersey's death penalty law" by subjecting to capital sentencing procedures those defendants whose heinous and brutal activities result in the deaths of their victims. *Id.*

164 Memorandum from M. Robert DeCotis, Chief Counsel, William Harla, Deputy Chief Counsel, Edward J. McBride, Jr., Assistant Counsel, on A.2113/S.1482 to Honorable Jim Florio 2 (Mar. 24, 1993) (on file with the *Seton Hall Legislative Journal*) [hereinafter *Memo to Florio on A.2113*].

ary 9, 1993, it was received in the Senate[165] and referred to the Senate Judiciary Committee, which reported favorably upon the bill on February 18, 1993.[166] On March 22, 1993, A.2113 substituted Senate Bill No. 1482,[167] its identical Senate counterpart, and passed the full Senate by a vote of 33-4.[168]

On May 5, 1993,[169] Governor Florio signed A.2113 into law.[170] The ceremonial bill signing took place in Piscataway, the home of Gail Shollar, a woman who was carjacked and murdered, ironically enough, on election night in 1992.[171] Present at the ceremony

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165 *Id.*

166 N.J. SENATE JUDICIARY COMM., STATEMENT to A.2113, 205th Leg., 2d Sess. (Feb. 18, 1993).

167 *Memo to Florio on A.2113, supra* note 164, at 2. The sponsors of S.1482 were Senators Sinagra (R-Middlesex) and Ciesla (R-Monmouth, Ocean). *Id.* at 1.

168 *Id. See also Death Penalty Clarification in Position for Florio Signing,* STAR LEDGER (Newark), Mar. 23, 1993, at 27. The four negative votes came from Senators Matthew Feldman (D-Bergen), John Lynch (D-Middlesex), William Haines (R-Burlington), and Edward O'Connor (D-Hudson). *Id.* Senator Feldman had always opposed the death penalty, voted against its reinstatement in 1982, and refused to vote for a bill which was intended to strengthen it. Telephone Interview with Betty Kraus, Legislative Aide to Senator Matthew Feldman (Aug. 31, 1993). While Senator Lynch voted in favor of ACR.20, he voted against A.2113. Telephone Interview with the Office of Senator John Lynch (Sept. 1, 1993). He reasoned that the Constitutional Amendment passed in 1992 on the same matter was so clear and comprehensive that A.2113 was an unnecessary pandering attempt on the part of the Republican-controlled Legislature. *Id.* Senator Haines is a Quaker who opposes the death penalty on moral and religious grounds. Telephone Interview with Bill Naulty, Legislative Aide to Senator C. William Haines (Sept. 23, 1994). Senator O'Connor is also anti-death penalty. Telephone Interview with Joe Guarino, Legislative Aide to Senator Edward T. O'Connor, Jr. (Sept. 23, 1994). *See supra* note 140.

169 Art Weissman, *Loophole in Death Penalty Law Closed,* ASBURY PARK PRESS, May 6, 1993, at A-3. The Governor was criticized by the bill's chief sponsor, Assemblyman Mikulak, for not acting quickly enough to sign the bill. Pasquale Di Fulco, *Florio Poised to Close Death Penalty Loophole,* HERALD & NEWS (Trenton Bureau), Apr. 4, 1993, at A-4. He accused the Governor of waiting for a good photo opportunity before signing the bill, and politicizing the issue. *Id.* The Florio Administration responded by stating that the proposed amendment was under legal review by the Governor's counsel. *Id.*

170 Governor Florio hailed A.2113 as bringing the State death penalty statute in line with the recently-amended New Jersey Constitution, which he claimed would fully eliminate any "loopholes" in the law. Governor James J. Florio, Remarks at the Signing of A.2113 2-3 (May 5, 1993) (on file with the *Seton Hall Legislative Journal*). He commended the Attorney General for initiating the legislation, as well as Assemblyman Mikulak for pushing the bill through the Legislature. *Id.* at 10.

171 Tom Haydon, *Law Lifts Roadblock to the Death Penalty,* STAR LEDGER (Newark), May 6, 1993, at 1. Shollar and her three-year-old daughter were forced at knife-point into their family van outside of a Pathmark in Middlesex County. *Id.* The little girl was found unharmed, but Shollar was abducted to a lumberyard less than a mile away, sexually assaulted, and stabbed to death. *Id.* Days later, police charged Scott John-

were members of Shollar's family, as well as deputy attorneys general and the legislators who sponsored the bill.[172] In a private ceremony before the bill signing, Governor Florio was presented with a petition, signed by more than 10,000 New Jersey residents, supporting the amendment to the death penalty law.[173] While the amended law could not be used against Shollar's killer,[174] the Governor expressed his hope that all future displays of wanton disregard for human life, such as the heinous demonstration perpetrated in the Shollar slaying, would be subject to the most severe of punishments.[175]

VI. A Bit of Skepticism

While the Legislature, the Executive Branch, and the County

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son, a 23 year-old ex-convict from Plainfield, with Schollar's murder. *Id.* Middlesex County Prosecutor Robert Gluck has chosen to handle the case personally, and is seeking the death penalty against Johnson. Memorandum from M. Robert DeCotis, Chief Counsel, William Harla, Deputy Chief Counsel, Edward J. McBride, Jr., Assistant Counsel on Background for Meeting With Family of Gail Shollar to Honorable Jim Florio (Apr. 1, 1993) (on file with the *Seton Hall Legislative Journal*). On September 8, 1994, Judge Barnett E. Hoffman, sitting in Middlesex County Superior Court, declined the defendant's request to hold the trial outside of Middlesex County. John Patella, *Accused Slayer's Requests Rejected*, ASBURY PARK PRESS, Sept. 9, 1994, at A13. Judge Hoffman likewise ruled against a defense motion to delay the proceedings due to "the prevailing 'hysteria' over other high-profile murder cases in the state," namely, the recent murders of six-year-old Amanda Wengert of Manalapan and seven-year-old Megan Kanka of Hamilton Township. *Id.* Jury selection was scheduled to begin September 12, 1994, with a trial date set for January 4, 1995. *Id.*

172 Haydon, *supra* note 171, at 1.

173 *Id.* The petitions were presented by Gail Shollar's brother and sister-in-law, William and Kathy Olsen. *Id.*

174 Dionne L. Ford, *Florio Inks Law to Simplify Death Penalty Rules*, HOME NEWS, May 6, 1993, at B1. Prosecutor Gluck said that the amendment probably would not apply to the Shollar slaying because the murder occurred before the legislation was passed. *Id.* To subject the defendant to the amended statute would constitute an *ex post facto* law. Such a law violates Article I, sections 9 and 10 of the United States Constitution, which read respectively that "[n]o . . . *ex post facto* Law shall be passed," and that "[n]o State shall . . . pass any . . . ex post facto law." U.S. CONST. art. I, § 9, 10. An *ex post facto* law is defined as

> [a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. A law is unconstitutionally '*ex post facto*' if it deprives the defendant of a defense to criminal liability that he had prior to enactment of the law.

BLACK'S LAW DICTIONARY 580 (6th ed. 1991).

175 Pat Politano, *Governor Signs Death Penalty Measures*, COURIER NEWS, May 6, 1993, at A-2. In the Governor's own eloquent words, "[n]othing can ever heal the wounds of their family . . . . But we can see that justice is done." *Id.*

Prosecutors have glorified the recent amendments to the Constitution and death penalty statute, there are those who maintain that the new law "will have virtually no effect" upon the administration of the death penalty in New Jersey.[176] Particularly vocal in its criticism of the constitutional amendment and the amended death penalty statute is the New Jersey Office of the Public Defender. The primary criticism heard from attorneys in that office is that the law, as amended, does nothing more than achieve a politically popular result,[177] which will not aid prosecutors in the least, who "'have a hard enough time trying to get the death penalty in cases where there was [an] intent to kill,'" let alone an intent to inflict serious bodily injury.[178] Representatives of the Public Defender's Office assert that a jury will not hand down a death sentence where there was no intent to kill, and prosecutors themselves will not seek the death penalty where intent cannot be proven. [179]

VII. Conclusion

As of this writing, the amendment to Article I, section 12 of the New Jersey Constitution and the amended death penalty statute have not been utilized by any prosecutor to squarely address the issues raised in *Gerald* and its progeny.[180] It remains to be seen,

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176 Di Fulco, *supra* note 169, at A-4.

177 Telephone Interview with Dale Jones, Assistant Public Defender, Director of the Capital Litigation Unit, Office of the Public Defender, State of New Jersey (July 23, 1993) [hereinafter *Telephone Interview with Dale Jones*]. Mr. Jones expressed his opinion that the whole process of amending the Constitution and the murder statute to do away with the intent distinction was nothing more than "a political public relations gambit." *Id.* Jones admitted that such an endeavor was the popular thing to do. *Id.* Though politically smart, the recent attempt to strengthen the death penalty, he stated, will have virtually no practical effect. *Id.* James Smith, an attorney in the Appellate Section of the Public Defender's Office, echoes the sentiments of Dale Jones, and adds that the amended law will bring "no systematic change" to the administration of capital punishment in New Jersey. Telephone Interview with James K. Smith, Assistant Deputy Public Defender, State of New Jersey (July 13, 1993).

178 Di Fulco, *supra* note 169, at A-4.

179 *Telephone Interview with Dale Jones*, *supra* note 177.

180 The Monmouth County Prosecutor's Office has, however, attempted to use the new law in a recent case. But on August 18, 1994, Judge Theodore J. Labrecque, sitting in Monmouth County Superior Court, ruled that the prosecution must prove that 24 year-old John Alfred Dow intended to kill 78 year-old Baldo D'Agostino when he set the victim on fire on March 2, 1993. Elaine Silvestrini, *Challenge to Death Penalty Law Successful*, ASBURY PARK PRESS, Aug. 19, 1994, at B-1. Dow's indictment alleged that he either intentionally killed D'Agostino or that he purposely or knowingly inflicted serious bodily injury which resulted in death. *Id.* at B-2. Since the murder

therefore, what effects the amended law will have upon the administration of capital punishment in New Jersey. Both the Constitutional Amendment and the amended death penalty statute, which abrogate the distinction between intent to kill and intent to commit serious bodily injury resulting in death, are nonetheless a tremendous movement toward creating an effective, workable, and uniform system of capital punishment in this state. A reading of the homicide statute prior to the amendment clearly indicates that it was, in fact, the Legislature's intent that those who commit serious bodily injury murder should be exposed to capital sentencing. The New Jersey Supreme Court disagreed, and handed down a decision which seemingly allowed the most vicious of killers to escape their just deserts. The Constitutional Amendment and the amended homicide statute send a loud and clear message to the court that those who willfully and wantonly inflict violent harm upon innocent people, resulting in death, are just as deserving of capital punishment as those who knowingly or purposely cause death.

Despite proffered criticism, the law now permits prosecutors to seek the death penalty in cases where the defendant only intended to inflict serious bodily injury and death happened to result. Such a prosecution is not only statutorily permissible, but is constitutionally sanctioned. The law squarely addresses and rectifies the problem that the *Gerald* line of cases demonstrated—that one's mental state is nearly impossible to prove, and that those who knowingly or purposely inflict serious bodily injury resulting in death should be punished just as severely as those who knowingly or purposely kill. The amendments restore a sense of fairness, justice, and workability to New Jersey's capital punishment system. Governor Florio, the Legislature, and the people of New Jersey should be commended for working together to achieve this milestone.

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took place two months prior to Governor Florio's signing of the legislation which is the subject of this note, the new law eliminating the intent distinction could not be applied in this case. *Id.* Jury selection in this case began October 17, 1994. Elaine Silvestrini, *In Hot Pursuit of Death Penalty*, ASBURY PARK PRESS, Nov. 13, 1994, at A-1, A-9.